92-360

No.

Supreme Court, U.S.
FILED
AUG 11 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

OWENS-ILLINOIS, INC.,
Petitioner,

v.

LINCOLN BOLYARD, *et al.*,
Respondents.

Petition for Writ of Certiorari to the Supreme Court of Appeals of West Virginia

---

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can the punitive damages awarded by one jury be sustained under the due process principles announced in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032 (1991), when a second jury, which heard the same evidence from the same witnesses in the same courtroom at the same time, found no punitive damages?

2. Does due process permit a state court jury to impose punitive damages without *any* appellate review?

3. Does due process permit repetitive awards of punitive damages for the same course of conduct in the absence of any mechanism for ensuring that the *total* punitive damages do not exceed the amount necessary for deterrence and punishment?

PARTIES AND RULE 29.1 STATEMENT

Civil Action No. 86-C-763

Thomas and Elizabeth Conrad
Mary Ann Jadot, Executrix of
the Estate of Jean Jadot
Ernestine Moomaw, Executrix of
the Estate of Franklin Moomaw
Ray and Dairy Wilson

Civil Action No. 86-C-764

Thomas and Betty Conley

Civil Action No. 86-C-765

Carl and Maurine Rothermund

Civil Action No. 86-C-782

Mickey and Linda Quince

Civil Action No. 86-C-800

Delilah Cross, Administratrix
of the Estate of
Frederick Cross

Civil Action No. 86-C-830

Lawrence and Eleanor Crooks
Helen Lee Smigell, Executrix
of the Estate of Rudy Smigell

Civil Action No. 86-C-831

Clarence and Bermoce Darrah
Edward and Verda Eikelberry

Civil Action No. 86-C-832

Jeanette Hoppers, Executrix of
the Estate of Alvin Hoppers
Ivan and Mable Lewis

Civil Action No. 86-C-833

Lincoln and Jacklyn Bolyard

Civil Action No. 87-C-11

Lucille Simmons, Executrix of
the Estate of Robert Simmons

Civil Action No. 88-C-146

Jeannette Rogers, Executrix of
the Estate of Earl Horne

Keene Corporation

—

Pursuant to Rule 29.1 of the Rules of this Court, the following is a list of affiliated corporate entities of the Petitioner:

Owens-Illinois de Puerto Rico
Cisper Industria e Comercio, S.A.
Companhia Industrial Sao Paulo e Rio
Cristaleria Peldar, S.A.
Andividrios, S.A.
Cristaleria del Ecuador, S.A.
Fabrica de Vidrio Los Andes, C.A.
Manufacturera de Vidrios Planos, C.A.
Owens-Illinois de Venezuela, C.A.

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IN THE

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OCTOBER TERM, 1992

No.

OWENS-ILLINOIS, INC.,
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v.

LINCOLN BOLYARD, *et al.*,
Respondents.

Petition for Writ of Certiorari to the Supreme Court of Appeals of West Virginia

---

PETITION FOR A WRIT OF CERTIORARI

Owens-Illinois, Inc. ("Owens-Illinois") respectfully petitions for a writ of certiorari to the Supreme Court of Appeals of West Virginia to review its decision on May 13, 1992 in this case.

ORDERS BELOW

The unreported Order entered on May 15, 1991 by the Circuit Court of Monongalia County, West Virginia, denying the motion of Owens-Illinois for judgment notwithstanding the verdict or, in the alternative, for a new trial, is attached as Appendix A. The unreported Order entered on May 13, 1992 by the Supreme Court of Appeals of West Virginia, denying the petition for an appeal of Owens-Illinois, is attached as Appendix B.

JURISDICTION

The Supreme Court of Appeals of West Virginia entered its Order on May 13, 1992. This Court has jurisdiction under 28 U.S.C.A. sec. 1257 (West Supp. 1992).

CONSTITUTIONAL PROVISION

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

This case arises in the asbestos-related personal injury litigation. Owens-Illinois is, and always has been, primarily a manufacturer of glass bottles. From the late 1940's until April 1958, Owens-Illinois manufactured and sold a rigid, preformed hydrous calcium silicate thermal insulation material, which contained approximately 15% asbestos. Owens-Illinois ceased all manufacture of this material in April 1958—longer than 34 years ago. Today, Owens-Illinois is named as one of the defendants in tens of thousands of cases in which the plaintiffs allege personal injury resulting from exposure to this Owens-Illinois material.

In July 1991, almost all the asbestos-related personal injury cases pending in federal courts were transferred to the Eastern District of Pennsylvania by the Judicial Panel on Multidistrict Litigation for consolidated pretrial proceedings under 28 U.S.C.A. sec. 1407 (West 1976 and Supp. 1992). *In re Asbestos Prods. Liab. Litig. (No. VI)*, 771 F. Supp. 415 (J.P.M.L. 1991). The tens of thousands of cases pending in state courts were not directly affected by this transfer, although the transferee judge (Weiner, J.) has coordinated his efforts with those of the state courts.

The cases that are the subject of this petition were tried in the Circuit Court of Monongalia County, West Virginia

in early 1991. That Court consolidated 39 separate cases into two groups for trial. The first group, consisting of 20 cases, was tried before Judge Robert B. Stone and a jury. The second group was tried before Judge Larry V. Starcher and a jury. The trials took place in separate courtrooms, except in two instances: The two judges and juries came together to hear the evidence of the defendants' knowledge—or lack of knowledge—of the risks of asbestos at the relevant times. This is the evidence that would be relevant to punitive damages. They also came together for the judges' instructions.

Thus, with respect to punitive damages, the two juries heard the same evidence and received the same instructions. Their verdicts, however, were dissimilar. Judge Starcher's jury declined to award any punitive damages. In contrast, Judge Stone's jury awarded punitive damages to six plaintiffs. The compensatory damages awarded those six plaintiffs varied significantly, but the amount of punitive damages was the same in each case: $5,000.

Judge Stone and Judge Starcher directed a verdict on the issue of whether Owens-Illinois' product was defective. The Judges reflected their decision in their charge to the juries:

> What constitutes a defective product under the law is normally a question the jury must decide. However, the Court has ruled as a matter of law that the asbestos-containing products involved in this case are, as a matter of law defective. Therefore, the defendants OI and Keene Corporation are liable to the plaintiffs for any damages caused to them by said defendants' asbestos-containing products.

The Judges reached this conclusion even though Owens-Illinois submitted substantial evidence to show that its product had not been defective, and even though other juries in West Virginia (and elsewhere) had returned verdicts in favor of Owens-Illinois on this issue. *E.g.*, *Murphy v. Owens-Illinois, Inc.*, 779 F.2d 340, 342-43 (6th Cir. 1985).

After the verdicts, Owens-Illinois submitted a timely motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. In its motion, Owens-Illinois explicitly challenged the award of punitive damages on the ground that it violated the Due Process Clauses of the United States Constitution. Owens-Illinois asserted that "[t]he method of determining punitive damages . . . deprived Owens-Illinois of due process." It also attacked "[r]epetitive punitive damage awards throughout the country" and "multiple punitive damages verdicts" in these cases on due process grounds. Finally, Owens-Illinois told the court that "granting a directed verdict in this context [i.e., a product liability case] irreconcilably prejudiced Owens-Illinois," depriving it of its right to due process.

The court summarily and without explanation denied Owens-Illinois' motion. Appendix A. Owens-Illinois then filed a timely petition for appeal with the Supreme Court of Appeals of West Virginia. (There is no intermediate appellate court in West Virginia, and appeal to the Supreme Court of Appeals is in the discretion of that court.)

In its petition for appeal, Owens-Illinois argued extensively that the law of West Virginia governing punitive damages was inconsistent with due process in light of this Court's decision in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032 (1991). It also attacked on due process grounds the multiple awards of punitive damages to which Owens-Illinois has been subjected and the directed verdict on product defect.

Soon after Owens-Illinois filed its petition for appeal, the Supreme Court of Appeals held that "[u]pon petition, this Court will review all punitive damages awards." *Fleming Landfill, Inc. v. Garnes*, 413 S.E.2d 897, 900 (W. Va. 1991) (on remand from the U.S. Supreme Court, 111 S. Ct. 2882 (1991)). Nonetheless, without explanation the West Virginia Court denied Owens-Illinois' petition for appeal on May 13, 1992. Appendix B.

REASONS FOR GRANTING THE WRIT

A. This case presents important questions of federal constitutional law that this Court has never addressed. The main obstacle to a negotiated resolution of the asbestos-related personal injury litigation is the continued availability of punitive damages. This case demonstrates in the starkest possible terms that claims for punitive damages in this litigation are like lottery tickets: two different juries, after hearing the same evidence, and the same instructions, at the same time in the same courtroom, reached diametrically opposed verdicts on punitive damages.

Owens-Illinois recognizes the validity of Justice Kennedy's observation that "nonuniformity cannot be equated with constitutional infirmity," *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1055 (1991) (Kennedy, J., concurring), but it is also true that the Fourteenth Amendment prohibits a state from imposing punitive damages on a wholly arbitrary basis, and the "disparate outcomes," *id.*, in this case are wholly arbitrary. Indeed, a civil justice system that tolerates this result is neither just nor a system.

B. This Court has never decided any case arising from the asbestos-related personal injury litigation. Yet the judiciary has not faced a challenge as great as the asbestos litigation since the days of school desegregation and the civil rights movement. This case is an appropriate vehicle for this Court to address the asbestos litigation. In particular, this case raises the issue—repetitive awards of punitive damages—that now stands in the way of any successful resolution of the asbestos litigation. Punitive damages are a "wild card" that prevents the parties from establishing predictable values for cases, and the settlement process depends on predictable values.

It should be noted that Judge Charles Weiner, the transferee judge in the federal multidistrict litigation, has acted to sever claims for punitive damages in the

federal cases. His recent suggestions of remand to the Judicial Panel on Multidistrict Litigation have contained the following finding:

> THE COURT FURTHER FINDS that the *issue of punitive damages must be resolved at a further date with regard to the entire MDL action*, and therefore any claims for punitive or exemplary damages are hereby ORDERED severed from these cases and retained by the Court within its jurisdiction over MDL-875 in the Eastern District of Pennsylvania.

Suggestion of Remand to the Judicial Panel, MDL-875 (E.D. Pa. April 30, 1992). Judge Weiner's severance of punitive damages claims is a constructive step, but the ultimate resolution of those claims would be advanced by review in this Court of this case.

In an ideal world, the asbestos litigation would be resolved through an administrative system of compensation pursuant to a statute enacted by Congress. *Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation* 27 (1991) ("The committee strongly urges the Judicial Conference to recommend that Congress consider a legislative dispute resolution system to resolve asbestos personal injury disputes."); *King v. Armstrong World Indus., Inc.*, 906 F.2d 1022, 1033 (5th Cir. 1990) ("Unfortunately, no legislative solution exists for the problem of determining punitive damages in the context of mass tort litigation."), *cert. denied*, 111 S. Ct. 2236 (1991); *In re Fibreboard Corp.*, 893 F.2d 706, 712 (5th Cir. 1990) ("We are told that . . . the difficulties faced by the courts [in the asbestos litigation] cry powerfully for innovation and judicial creativity. The arguments are compelling, but they are better addressed to the representative branches—Congress and the State Legislature."); *see Racich v. Celotex Corp.*, 887 F.2d 393, 399 (2d Cir. 1989) (punitive damages in mass tort litigation "suggest[] the need for a uniform, national rule on the issue").

This is not an ideal world, and the asbestos litigation is, and likely will remain, the judiciary's responsibility. The prospects for a fair and reasonable resolution of this litigation would be materially advanced by review of this case by this Court.

C. In this case, Owens-Illinois has been punished by the imposition of punitive damages without *any* appellate review of the trial court's summary denial of Owens-Illinois' post-trial motion. Owens-Illinois based its Petition for Appeal to the West Virginia Supreme Court of Appeals in large part on this Court's decision in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032 (1991). The West Virginia court denied that petition without explanation, even though six months before that court held it would, upon petition, review *all* punitive damages awards. *Fleming Landfill, Inc. v. Garnes*, 413 S.E.2d 897, 900 (W. Va. 1991) (on remand from the U.S. Supreme Court, 111 S. Ct. 2882 (1991)).

The chronology of this case is important: The juries returned their opposing verdicts on March 21, 1991, about two weeks after this Court's landmark decision in *Haslip*. On June 28, 1991, this Court granted certiorari in *Fleming Landfill, Inc. v. Garnes* and remanded that case to the West Virginia Supreme Court of Appeals "for further consideration in light of [*Haslip*]." 111 S. Ct. 2882 (1991).

On October 15, 1991, Owens-Illinois filed its Petition for Appeal in this case to the Supreme Court of Appeals. A major point of Owens-Illinois' Petition was that the West Virginia procedures for assessing punitive damages were inconsistent with *Haslip*. The Petition for Appeal was in all respects timely and consistently with the applicable West Virginia statute and rules of procedure.

Seven weeks later, on December 5, 1991, the Supreme Court of Appeals decided *Fleming Landfill* on remand from this Court. 43 S.E.2d 897 (W. Va. 1991). The

West Virginia court, in a unanimous and thoughtful opinion, reversed the punitive damages judgment in that case on the ground that the trial court had failed to give meaningful or adequate review to the jury's verdict. The court also held that the traditional West Virginia standard of review was too weak in light of *Haslip*. Most significantly, the West Virginia court emphasized the importance of meaningful appellate review under the due process principles announced in *Haslip*, and for this reason it held that "[u]pon petition, this Court will review *all* punitive damages awards." *Id.* at 900 (emphasis added).

The result of *Fleming Landfill* was that the West Virginia law under which the juries here had rendered their opposing verdicts was unconsitutional. Because the Supreme Court of Appeals had *explicitly* held that it would, upon petition, review *all* punitive damages awards, Owens-Illinois expected that its pending Petition for Appeal, which was predicated on *Haslip* grounds, would be granted. Nonetheless, without explanation, the West Virginia court *denied* the Petition on May 13, 1992.

Thus, unless this Court grants the writ of certiorari, Owens-Illinois will be punished by the imposition of punitive damages under state procedures that have been held to be constitutionally inadequate, and this result will have been accomplished without *any* appellate review.

This Court in *Haslip* approved the Alabama procedures governing punitive damages, but it did so in part because of the nature of appellate review in Alabama. It noted that "the Supreme Court of Alabama had established post-trial procedures for scrutinizing punitive awards," *Haslip*, 111 S. Ct. at 1044, including that trial courts in Alabama were required to "reflect in the record" the reasons for refusing to interfere with a jury verdict. *Id.* (quoting from *Hammond v. City of Gadsden*, 493 So.2d 1374, 1379 (Ala. 1986)). Furthermore, the review of punitive awards by the Alabama Supreme Court "pro-

vides an additional check on the jury's . . . discretion" that has "real effect." *Haslip*, 111 S. Ct. at 1045.

Nothing consistent with *Haslip* happened in this case. The trial court summarily and without explanation denied Owens-Illinois' post-trial motion. The West Virginia Supreme Court of Appeals then refused to review that decision *at all*, much less under the rigorous standards that court itself adopted in *Fleming Landfill* on remand from this Court. That court gave no explanation of its action in this case given its holding in *Fleming Landfill* that "[u]pon review, this Court will review all punitive damages awards."

The course of proceedings below raises the important constitutional issue whether due process requires state courts to provide at least one level of appellate review for any jury verdict that awards punitive damages. *Haslip* plainly implies that due process *does* so require. *Compare Lindsey v. Normet*, 405 U.S. 56, 77 (1972) (White, J.) ("When an appeal is afforded, however, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause."), *with Jones v. Barnes*, 463 U.S. 745, 756-57 n.1 (1983) (Brennan, J., dissenting) ("There are few, if any, situations in our system of justice in which a single judge is given unreviewable discretion over matters concerning a person's liberty or property").

It should be noted that, along with *Haslip*, Owens-Illinois also argued in its Petition for Appeal that the trial court's decision to direct a verdict against Owens-Illinois on the issue of "product defect" was fundamentally unfair. The law is settled in West Virginia that product defect is an issue for the "collective common sense of the jury." *Morningstar v. Black & Decker Mfg. Co.*, 253 S.Ed.2d 666, 682 n.21 (W. Va. 1979). Indeed, counsel for Owens-Illinois have been unable to locate *any* reported appellate decision in a products liability case where a directed verdict was granted *against* the defendant on

this issue. *Cf. Murphy v. Owens-Illinois, Inc.*, 779 F.2d 340, 342-43 (6th Cir. 1985) (affirming denial of plaintiff's motion for directed verdict on product defect, and affirming jury verdict in favor of Owens-Illinois). If the seventh amendment governed here, there would have been a plain denial of Owens-Illinois' right to a jury trial. *See Minneapolis & St. L. R.R. v. Bombolis*, 241 U.S. 211, 217 (1916) (seventh amendment applies only to proceedings in federal court).

D. Repetitive awards of punitive damages for the same course of conduct are inconsistent with due process for two reasons: First, the principles announced by this Court in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032, 1044 (1991), require that there be a rational system for ensuring that the amount imposed as punitive damages does not exceed that necessary to accomplish society's goals of retribution and deterrence. Since West Virginia lacks any such system, the awards here cannot stand. Second, due process prohibits the states from punishing a person or business twice for the same offense.

While no appellate court has held that repetitive awards of punitive damages for the same course of conduct violate due process, several courts have voiced strong concerns about the "overkill" effect of these awards. In *King v. Armstrong World Industries, Inc.*, 906 F.2d 1022 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 2236 (1991), for example, the court upheld an award of punitive damages against Celotex Corporation—an asbestos defendant that is now under the protection of the bankruptcy court. Celotex argued that punitive damages in the asbestos litigation had become so "irrelevant to the policy reason for punitive damages" as to amount to a violation of due process.

The Fifth Circuit viewed itself as bound by *stare decisis* and so upheld the award, but only with "misgivings:"

> We have misgivings, however, because we are acutely conscious of the prophetic words Judge Henry Friendly used twenty-three years ago: "The legal difficulties engendered by claims for punitive damages on the part of hundreds of plaintiffs are staggering . . . We have the greatest difficulty perceiving how such claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill."

Id. at 1033 (quoting *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839 (2d Cir. 1967) (Friendly, J.)). *See Racich v. Celotex Corp.*, 887 F.2d 393, 398 (2d Cir. 1989) ("We agree that the multiple imposition of punitive damages for the same course of conduct may raise serious constitutional concerns, in the absence of any limiting principle."); *Juzwin v. Amtorg Trading Corp.*, 705 F. Supp. 1053, 1065 (D.N.J. 1988) ("Due process requires that a limit be placed upon a defendant's liability for punitive damages for a single course of conduct."); *Juzwin v. Amtorg Trading Corp.*, 718 F. Supp. 1233, 1236 (D.N.J. 1989) (court concluded that vacating earlier decision against repetitive awards would be appropriate in light of court's inability to limit punitive awards by other courts); *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 718, 728 (E.D.N.Y. 1983); *In re Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab.*, 526 F. Supp. 887, 900 (N.D. Cal. 1981), *rev'd*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983).

Judge Friendly's concern that repeated awards of punitive damages could result in "overkill" ties in exactly with this Court's decision in *Haslip*. That case established that due process imposes both substantive and procedural limitations on awards of punitive damages. Substantively, an award may not exceed the amount required to meet society's goals of deterrence and retribution. *Haslip*, 111 S. Ct. at 1044-45. In addition, a system of awarding punitive damages must provide procedural mechanisms to ensure that an award is not constitutionally excessive. In-

deed, *Haslip* appears to require a state that wishes to impose punitive damages to do so *only* under a rational and systematic decisionmaking process that ensures the amount of such damages is no more than required for deterrence and retribution. *Id.*

Although *Haslip* involved only a single imposition of punitve damages, the case is fully applicable to the asbestos-related personal injury litigation, where a single course of conduct by Owens-Illinois has led to repetitive awards of punitive damages. *E.g., Johnson v. Celotex Corp.*, 899 F.2d 1281, 1283 (2d Cir.) (punitive damages verdicts against Owens-Illinois in two cases in the total amount of $1.8 million), *cert. denied*, 111 S. Ct. 297 (1990).

Yet there is *no* decisionmaking process in West Virginia —let alone a rational and systematic one—that ensures that the total amount mulcted from Owens-Illinois in punitive damages over the life of this litigation is within the limits of due process.

As an illustration, take one of the factors in the *Haslip* due process calculus: "the existence of other civil awards against the defendant for the same conduct." *Id.* at 1045. This factor required the West Virginia courts here, in assessing the amount of punitive damages that would be appropriate in light of the goals of deterrence and retribution, to consider other awards against Owens-Illinois. (This consideration, of course, would tend to reduce the amount of any additional award of punitive damages.) Not only did the West Virginia courts not consider this factor, there is not even a mechanism in West Virginia law to permit this to be done. This is a basic constitutional deficiency, which must be remedied before Owens-Illinois could be held liable for additional punitive damages.

CONCLUSION

For the reasons stated above, the writ of certiorari should be granted and the judgment below reversed.

Respectfully submitted,

Of Counsel:
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Attorneys for Petitioner

* Counsel of Record

August 11, 1992

APPENDICES

APPENDIX A

STATE OF WEST VIRGINIA, SS:

In the Circuit Court of Monongalia County, West Virginia, on the 15th day of May, 1991, the following order was made and entered:

IN THE CIRCUIT COURT OF
MONONGALIA COUNTY, WEST VIRGINIA

Civil Action No.: 86-C-833

CLARENCE FRIEND *et al.*,
Plaintiff,

v.

ARMSTRONG WORLD INDUSTRIES, INC., *et al.*
Defendants.

JUDGMENT ORDER

BE IT REMEMBERED that on the 15th day of May, 1991, came the parties, by counsel, and did argue their motions for judgments notwithstanding the verdicts and for new trial based upon the verdicts entered against them by a petit jury of this Court on the 18th day of March, 1991.

The Court having maturely considered the same, does hereby HOLD and ORDER that all motions for judgments notwithstanding the verdict and for new trials are hereby denied.

The Court does hereby find that the jury's verdict was in favor of the Defendant Keene Corporation.

The Court does hereby HOLD and ORDER that the Defendant Keene Corporation shall pay no monies to the plaintiff as compensatory damages.

This Court previously having ruled that the cases listed herein did not involve claims for risk of subsequently developing cancer, but rather were claims for asbestos pleural disease and parenchymal asbestosis, including fear of cancer, it is Ordered that the jury verdict and subsequent entry of judgment pursuant to said verdict does not extinguish any rights should the plaintiff subsequently develop an asbestos-related malignancy. The Court has specifically ruled that claims for asbestos-related malignancies constitute separate causes of actions from claims for asbestos pleural disease and parenchymal asbestosis and fear of cancer.

Costs are taxed against non-prevailing Defendants.

The Defendants object and except to all adverse rulings of the Court.

ENTERED under my hand this 15th day of May, 1991.

/s/ Robert B. Stone
Judge Stone

SUBMITTED BY:

Scott S. Segal
HOSTLER AND SEGAL
810 Kanawha Boulevard East
Charleston, WV 25301
(304) 344-9100

Entered May 15, 1991 Civil Order Book 72, page 175 Jean Friend, Clerk.

A True Copy

Attest: Jean Friend, Clerk
Monongalia County Circuit Court

APPENDIX B

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 13th day of May, 1992, the following order was made and entered:

No. 913029

LINCOLN BOLYARD, *et al.*,
Plaintiffs Below, Respondents,

vs.

OWENS-ILLINOIS, INC., *et al.*,
Defendants Below

OWENS-ILLINOIS, INC.,
Defendant Below, Petitioner

On a former day, to-wit, December 5, 1991, came the petitioner, Owens-Illinois, Inc., by Spilman, Thomas, Battle & Klostermeyer, David K. Hendrickson and R. Scott Long, its attorneys, and presented to the Court its petition praying for an appeal from a judgment of the Circuit Court of Monongalia County, rendered on the 4th day of June, 1991, with the record therein accompanying the petition. Previously, on the 13th day of November, 1991, came the respondents by Hostler & Segal, and Scott S. Segal, and Henderson & Goldberg, Theodore Goldberg and Tybe A. Brett, their attorneys, and presented to the Court their written response in opposition thereto. Finally, on the 5th day of December, 1991, came the appellant, Owens-Illinois, Inc., by Spilman, Thomas, Battle & Klostermeyer, David K. Hendrickson and Miller A. Bushong, III, its attorneys, and presented to the Court its written reply thereto.

Upon consideration whereof, the Court is of opinion to and doth hereby refuse said petition for appeal.

A True Copy

Attest: /s/ April H. Ramey
Clerk, Supreme Court of Appeals

Supreme Court, U.S.
FILED
AUG 28 1992
OFFICE OF THE CLERK

92-360

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

OWENS-ILLINOIS, INC.,
Petitioner,

v.

LINCOLN BOLYARD, *et al.*,
Respondents.

Petition for Writ of Certiorari to the Supreme Court of Appeals of West Virginia

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SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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IN THE CIRCUIT COURT
OF MONONGALIA COUNTY, WEST VIRGINIA

Civil Action No.: 86-C-763

THOMAS ROBERT CONRAD, SR. and
ELIZABETH CONRAD, his wife,
Plaintiffs,

v.

ARMSTRONG WORLD INDUSTRIES, INC., *et al.*,
Defendants.

JUDGMENT ORDER

BE IT REMEMBERED that on the 25th day of April, 1991, came the parties, by counsel, and did argue their motions for judgments notwithstanding the verdicts and for new trial based upon the verdicts entered against them by a petit jury of this Court on the 22nd day of March, 1991.

The Court having maturely considered the same, does hereby HOLD and ORDER that all motions for judgments notwithstanding the verdict and for new trials are hereby denied.

The Court does hereby further HOLD and ORDER that Plaintiff Thomas Robert Conrad, Sr.'s compensatory damages were determined by the Jury to be One Hundred Thousand Dollars ($100,000.00). The Court does hereby further find that the Plaintiff Thomas Robert Conrad, Sr. had negotiated settlements in his case totalling Sixty-One Thousand Nine Hundred Dollars ($61,900.00) prior to said verdict. The Court does in addition find that Two Thousand Four Hundred Dollars ($2,400.00) of these negotiated settlements is based upon a

contingent and deferred payment and should therefore not be set off from the judgment at this time. The Court does hereby HOLD and ORDER that the appropriate amount of set-offs from the One Hundred Thousand Dollars ($100,000.00) compensatory verdict shall be Fifty-Nine Thousand Five Hundred Dollars ($59,500.00).

The only defendants against whom Plaintiff was awarded a verdict both jointly and severally was the Defendants Owens-Illinois, Inc. and Keene Corporation. The Defendants Owens-Illinois and Keene Corporation is therefore ORDERED to pay unto the Plaintiff both jointly and severally the sum of Forty Thousand Five Hundred Dollars ($40,500.00) plus interest thereon from the date of the jury verdict on March 22, 1991, until paid.

Owens-Illinois, Inc., is hereby ORDERED to forthwith obtain a bond in the sum of Forty Thousand Five Hundred Dollars ($40,500.00) prior to perfecting any appeal in this matter, plus an additional amount of $4,000.00 dollars.

Keene Corporation is hereby ORDERED to forthwith obtain a bond in the sum of Forty Thousand Five Hundred Dollars ($40,500.00) prior to perfecting any appeal in this matter, plus an additional amount of $4,000.00 Dollars.

This Court previously having ruled that the cases listed herein did not involve claims for risk of subsequently developing lung cancer or mesothelioma, but rather were claims for asbestos pleural disease, parenchymal asbestosis, and colon cancer, including fear of cancer, it is Ordered that the jury verdict and subsequent entry of judgment pursuant to said verdict does not extinguish any rights should the plaintiff subsequently develop an asbestos-related lung malignancy, including lung cancer or mesothelioma. The Court has specifically ruled that claims for asbestos-related lung malignancies constitute causes of actions separate from claims

for asbestos pleural disease, parenchymal asbestosis, laryngeal or colon cancer and fear of cancer.

Costs are taxed against non-prevailing Defendants.

The Defendants object and except to all adverse rulings of the Court.

ENTERED under my hand this 25th day of April, 1991.

/s/ Larry V. Starcher
JUDGE STARCHER

SUBMITTED BY:

/s/ Scott S. Segal
SCOTT S. SEGAL
HOSTLER AND SEGAL
810 Kanawha Boulevard, East
Charleston, WV 25301
(304) 344-9100

IN THE CIRCUIT COURT
OF MONONGALIA COUNTY, WEST VIRGINIA

Civil Action No.: 86-C-763

MARY ANN JADOT, Executrix of
the Estate of Jean Jadot,
Plaintiff,

v.

ARMSTRONG WORLD INDUSTRIES, *et al.*,
Defendants.

JUDGMENT ORDER

BE IT REMEMBERED that on the 25th day of April, 1991, came the parties by counsel, and did argue their motions for judgments notwithstanding the verdicts and for new trial based upon the verdicts entered against them by a petit jury of this Court on the 22nd day of March, 1991.

The Court having maturely considered the same, does hereby HOLD and ORDER that all motions for judgments notwithstanding the verdict and for new trials are hereby denied.

The Court does hereby further HOLD and ORDER that Plaintiff Mary Ann Jadot's compensatory damages were determined by the Jury to be One Hundred Twenty-Six Thousand Seven Hundred Dollars ($126,700.00). The Court does hereby further find that the Plaintiff Mary Ann Jadot had negotiated settlements in her case totalling Forty Thousand Two Hundred Fifty Dollars ($40,250.00) prior to said verdict. The Court does in addition find that Two Thousand Four Hundred Dollars ($2,400.00) of these negotiated settlements is based upon a contingent

and deferred payment and should therefore not be set off from the judgment at this time. The Court does hereby HOLD and ORDER that the appropriate amount of set-offs from the One Hundred Twenty-Six Thousand Seven Hundred Dollars ($126,700.00) compensatory verdict shall be Thirty-Seven Thousand Eight Hundred Fifty Dollars ($37,850.00).

In addition to the above stated damages, the Court hereby finds the Plaintiff was awarded the sum of One Thousand Nine Hundred Dollars ($1,900.00) for funeral, hospital and medical expenses and it is ORDERED Plaintiff receive pre-judgment interest at the legal rate on said amount from the date the damages were incurred until paid.

The only defendants against whom Plaintiff was awarded a verdict both jointly and severally was the Defendants Owens-Illinois, Inc. and Keene Corporation. The Defendants Owens-Illinois and Keene Corporation is therefore ORDERED to pay unto the Plaintiff both jointly and severally the sum of Eighty-Eight Thousand Eight Hundred Fifty Dollars ($88,850.00) plus interest thereon from the date of the jury verdict on March 22, 1991, until paid.

Owen-Illinois, Inc., is hereby ORDERED to forthwith obtain a bond in the sum of Eighty-Eight Thousand Eight Hundred Fifty Dollars ($88.850.00) prior to perfecting any appeal in this matter, plus an additional amount of $8,800.00 dollars.

Keene Corporation is hereby ORDERED to forthwith obtain a bond in the sum of Eighty-Eight Thousand Eight Hundred Fifty Dollars ($88,850.00) prior to perfecting any appeal in this matter, plus an additional amount of $8,800.00 Dollars.

Costs are taxed against non-prevailing Defendants.

The Defendants object and except to all adverse rulings of the Court.

ENTERED under my hand this 25th day of April, 1991.

/s/ Larry V. Starcher
JUDGE STARCHER

SUBMITTED BY:

/s/ Scott S. Segal
SCOTT S. SEGAL
HOSTLER AND SEGAL
810 Kanawha Boulevard, East
Charleston, WV 25301
(304) 344-9100

IN THE CIRCUIT COURT
OF MONONGALIA COUNTY, WEST VIRGINIA

Civil Action No.: 86-C-763

ERNESTINE MOOMAW, Executrix of
the Estate of F. Wayne Moomaw,
Plaintiff,

v.

ARMSTRONG WORLD INDUSTRIES, *et al.*,
Defendants.

JUDGMENT ORDER

BE IT REMEMBERED that on the 25th day of April, 1991, came the parties, by counsel, and did argue their motions for judgments notwithstanding the verdicts and for new trial based upon the verdicts entered against them by a petit jury of this Court on the 22nd day of March, 1991.

The Court having maturely considered the same, does hereby HOLD and ORDER that all motions for judgments notwithstanding the verdict and for new trials are hereby denied.

The Court does hereby further HOLD and ORDER that Plaintiff Ernestine Moomaw's compensatory damages were determined by the Jury to be One Hundred Thirty-Nine Thousand Seven Hundred Seventeen Dollars ($139,717.00). The Court does hereby further find that the Plaintiff Ernestine Moomaw had negotiated settlements in her case totalling Forty-One Thousand Four Hundred Fifty Dollars ($41,450.00) prior to said verdict. The Court does in addition find that Five Thousand Four Hundred Dollars ($5,400.00) of these negotiated settle-

ments is based upon a contingent and deferred payment and should therefore not be set off from the judgment at this time. The Court does hereby HOLD and ORDER that the appropriate amount of set-offs from the One Hundred Thirty-Nine Thousand Seven Hundred Seventeen Dollars ($139,717.00) compensatory verdict shall be Thirty-Six Thousand Fifty Dollars ($36,050.00).

In addition to the above stated damages, the Court hereby finds the Plaintiff was awarded the sum of Five Thousand Three Hundred Seventeen Dollars ($5,317.00) for funeral, hospital and medical expenses and it is ORDERED Plaintiff receive pre-judgment interest at the legal rate on said amount from the date the damages were incurred until paid.

The only defendants against whom Plaintiff was awarded a verdict both jointly and severally was the Defendants Owens-Illinois, Inc. and Keene Corporation. The Defendants Owens-Illinois and Keene Corporation is therefore ORDERED to pay unto the Plaintiff both jointly and severally the sum of One Hundred Three Thousand Six Hundred Sixty-Seven Dollars ($103,667.00) plus interest thereon from the date of the jury verdict on March 22, 1991, until paid.

Owen-Illinois, Inc., is hereby ORDERED to forthwith obtain a bond in the sum of One Hundred Three Thousand Six Hundred Sixty-Seven Dollars ($103,667.00) prior to perfecting any appeal in this matter, plus an additional amount of $10,000.00 dollars.

Keene Corporation is hereby ORDERED to forthwith obtain a bond in the sum of One Hundred Three Thousand Six Hundred Sixty-Seven Dollars ($103,667.00) prior to perfecting any appeal in this matter, plus an additional amount of $10,000.00 Dollars.

Costs are taxed against non-prevailing Defendants.

The Defendants object and except to all adverse rulings of the Court.

ENTERED under my hand this 25th day of April, 1991.

/s/ Larry V. Starcher
JUDGE STARCHER

SUBMITTED BY:

/s/ Scott S. Segal
SCOTT S. SEGAL
HOSTLER AND SEGAL
810 Kanawha Boulevard, East
Charleston, WV 25301
(304) 344-9100

IN THE CIRCUIT COURT
OF MONONGALIA COUNTY, WEST VIRGINIA

Civil Action No.: 86-C-763

RAY H. WILSON, *et al.*,
Plaintiff,

v.

ARMSTRONG WORLD INDUSTRIES, INC., *et al.*,
Defendants.

JUDGMENT ORDER

BE IT REMEMBERED that on the 15th day of May, 1991, came the parties, by counsel, and did argue their motions for judgments notwithstanding the verdicts and for new trial based upon the verdicts entered against them by a petit jury of this Court on the 18th day of March, 1991.

The Court having maturely considered the same, does hereby HOLD and ORDER that all motions for judgments notwithstanding the verdict and for new trials are hereby denied.

The Court does hereby find that the compensatory damages awarded to the plaintiff of Twenty-Five Thousand Dollars ($25,000.00) have been fully satisfied as a result of pre-trial settlements.

The Court does hereby HOLD and ORDER that the Defendant Owens-Illinois, Inc. shall pay no monies to the plaintiff as compensatory damages. However, pursuant to the jury's verdict in the above-styled action, the Defendant Owens-Illinois, Inc. is ordered to pay the plaintiff the sum of Five Thousand Dollars ($5,000.00) as punitive and exemplary damages. Such punitive and ex-

emplary damage awards shall in addition thereto include interest as of the date of the jury verdict at the legal rate of interest until such time as said judgments are paid.

Owens-Illinois, Inc. is hereby ORDERED to forthwith obtain a bond in the sum of Five Thousand Dollars ($5,000.00) prior to perfecting any appeal in this matter, plus an additional amount of $500.00 dollars.

This Court previously having ruled that the cases listed herein did not involve claims for risk of subsequently developing cancer, but rather were claims for asbestos pleural disease and parenchymal asbestosis, including fear of cancer, it is Ordered that the jury verdict and subsequent entry of judgment pursuant to said verdict does not extinguish any rights should the plaintiff subsequently develop an asbestos-related malignancy. The Court has specifically ruled that claims for asbestos-related malignancies constitute separate causes of actions from claims for asbestos pleural disease and parenchymal asbestosis and fear of cancer.

Costs are taxed against non-prevailing Defendants.

The Defendants object and except to all adverse rulings of the Court.

ENTERED under my hand this 15th day of May, 1991.

/s/ Robert B. Stone
JUDGE STONE

SUBMITTED BY:

SCOTT S. SEGAL
HOSTLER AND SEGAL
810 Kanawha Boulevard, East
Charleston, WV 25301
(304) 344-9100

IN THE CIRCUIT COURT
OF MONONGALIA COUNTY, WEST VIRGINIA

Civil Action No.: 86-C-764

THOMAS N. CONLEY, *et al.*,
Plaintiff,

v.

ARMSTRONG WORLD INDUSTRIES, INC., *et al.*,
Defendants.

JUDGMENT ORDER

BE IT REMEMBERED that on the 15th day of May, 1991, came the parties, by counsel, and did argue their motions for judgments notwithstanding the verdicts and for new trial based upon the verdicts entered against them by a petit jury of this Court on the 18th day of March, 1991.

The Court having maturely considered the same, does hereby HOLD and ORDER that all motions for judgments notwithstanding the verdict and for new trials are hereby denied.

The Court does hereby find that the compensatory damages awarded to the plaintiff of Twenty Thousand Dollars ($20,000.00) have been fully satisfied as a result of pre-trial settlements.

The Court does hereby HOLD and ORDER that the Defendant Owens-Illinois, Inc. shall pay no monies to the plaintiff as compensatory damages. However, pursuant to the jury's verdict in the above-styled action, the Defendant Owens-Illinois, Inc. is ordered to pay the plaintiff the sum of Five Thousand Dollars ($5,000.00) as puni-

tive and exemplary damages. Such punitive and exemplary damage awards shall in addition thereto include interest as of the date of the jury verdict at the legal rate of interest until such time as said judgments are paid.

Owens-Illinois, Inc. is hereby ORDERED to forthwith obtain a bond in the sum of Five Thousand Dollars ($5,000.00) prior to perfecting any appeal in this matter, plus an additional amount of $500.00 dollars.

This Court previously having ruled that the cases listed herein did not involve claims for risk of subsequently developing cancer, but rather were claims for asbestos pleural disease and parenchymal asbestosis, including fear of cancer, it is Ordered that the jury verdict and subsequent entry of judgment pursuant to said verdict does not extinguish any rights should the plaintiff subsequently develop an asbestos-related malignancy. The Court has specifically ruled that claims for asbestos-related malignancies constitute separate causes of actions from claims for asbestos pleural disease and parenchymal asbestosis and fear of cancer.

Costs are taxed against non-prevailing Defendants.

The Defendants object and except to all adverse rulings of the Court.

ENTERED under my hand this 15th day of May, 1991.

/s/ Robert B. Stone
JUDGE STONE

SUBMITTED BY:

SCOTT S. SEGAL
HOSTLER AND SEGAL
810 Kanawha Boulevard, East
Charleston, WV 25301
(304) 344-9100

IN THE CIRCUIT COURT
OF MONONGALIA COUNTY, WEST VIRGINIA

Civil Action No.: 86-C-765

CARL ROTHERMUND and MAURINE ROTHERMUND, his wife,
Plaintiffs,

v.

ARMSTRONG WORLD INDUSTRIES, INC., *et al.*,
Defendants.

JUDGMENT ORDER

BE IT REMEMBERED that on the 25th day of April, 1991, came the parties, by counsel, and did argue their motions for judgments notwithstanding the verdicts and for new trial based upon the verdicts entered against them by a petit jury of this Court on the 22nd day of March, 1991.

The Court having maturely considered the same, does hereby HOLD and ORDER that all motions for judgments notwithstanding the verdict and for new trials are hereby denied.

The Court does hereby further HOLD and ORDER that Plaintiff Carl Rothermund's compensatory damages were determined by the Jury to be One Hundred Twenty-One Thousand Dollars ($121,000.00). The Court does hereby further find that the Plaintiff Carl Rothermund had negotiated settlements in his case totalling Sixty-Eight Thousand Fifty Dollars ($68,050.00) prior to said verdict. The Court does in addition find that Five Thousand Four Hundred Dollars ($5,400.00) of these negotiated settlements is based upon a contingent and deferred payment and should therefore not be set off from

the judgment at this time. The Court does hereby HOLD and ORDER that the appropriate amount of set-offs from the One Hundred Twenty-One Thousand Dollars ($121,000.00) compensatory verdict shall be Sixty-Two Thousand Six Hundred Fifty Dollars ($62,650.00).

The only defendants against whom Plaintiff was awarded a verdict both jointly and severally was the Defendants Owens-Illinois, Inc. and Keene Corporation. The Defendants Owens-Illinois and Keene Corporation is therefore ORDERED to pay unto the Plaintiff both jointly and severally the sum of Fifty-Eight Thousand Three Hundred Fifty Dollars ($58,350.00) plus interest thereon from the date of the jury verdict on March 22, 1991, until paid.

Owens-Illinois, Inc., is hereby ORDERED to forthwith obtain a bond in the sum of Fifty-Eight Thousand Three Hundred Fifty Dollars ($58,350.00) prior to perfecting any appeal in this matter, plus an additional amount of $5,800.00 dollars.

Keene Corporation is hereby ORDERED to forthwith obtain a bond in the sum of Fifty-Eight Thousand Three Hundred Fifty Dollars ($58,350.00) prior to perfecting any appeal in this matter, plus an additional amount of $5,800.00 Dollars.

This Court previously having ruled that the cases listed herein did not involve claims for risk of subsequently developing lung cancer or mesothelioma, but rather were claims for asbestos pleural disease, parenchymal asbestosis, and colon cancer, including fear of cancer, it is Ordered that the jury verdict and subsequent entry of judgment pursuant to said verdict does not extinguish any rights should the plaintiff subsequently develop an asbestos-related lung malignancy, including lung cancer or mesothelioma. The Court has specifically ruled that claims for asbestos-related lung malignancies

constitute causes of actions separate from claims for asbestos pleural disease, parenchymal asbestosis, laryngeal or colon cancer and fear of cancer.

Costs are taxed against non-prevailing Defendants.

The Defendants object and except to all adverse rulings of the Court.

ENTERED under my hand this 25th day of April, 1991.

/s/ Larry V. Starcher
JUDGE STARCHER

SUBMITTED BY:

/s/ Scott S. Segal
SCOTT S. SEGAL
810 Kanawha Boulevard, East
Charleston, WV 25301
(304) 344-9100

STATE OF WEST VIRGINIA, SS:

In the Circuit Court of Monongalia County, West Virginia, on the 15th day of May, 1991, the following order as made and entered:

IN THE CIRCUIT COURT
OF MONONGALIA COUNTY, WEST VIRGINIA

Civil Action No.: 86-C-782

MICKEY QUINCE, SR., *et al.*,
Plaintiff,

v.

ARMSTRONG WORLD INDUSTRIES, INC., *et al.*,
Defendants.

JUDGMENT ORDER

BE IT REMEMBERED that on the 15th day of May, 1991, came the parties, by counsel, and did argue their motions for judgments notwithstanding the verdicts and for new trial based upon the verdicts entered against them by a petit jury of this Court on the 18th day of March, 1991.

The Court having maturely considered the same, does hereby HOLD and ORDER that all motions for judgments notwithstanding the verdict and for new trials are hereby denied.

The Court does hereby find that the compensatory damages awarded to the plaintiff of Fifteen Thousand Dollars ($15,000.00) have been fully satisfied as a result of pre-trial settlements.

The Court does hereby HOLD and ORDER that the Defendant Owens-Illinois, Inc. shall pay no monies to the plaintiff as compensatory damages. However, pursuant to the jury's verdict in the above-styled action, the De-

fendant Owens-Illinois, Inc. is ordered to pay the plaintiff the sum of Five Thousand Dollars ($5,000.00) as punitive and exemplary damages. Such punitive and exemplary damage awards shall in addition thereto include interest as of the date of the jury verdict at the legal rate of interest until such time as said judgments are paid.

Owens-Illinois, Inc. is hereby ORDERED to forthwith obtain a bond in the sum of Five Thousand Dollars ($5,000.00) prior to perfecting any appeal in this matter, plus an additional amount of $500.00 dollars.

This Court previously having ruled that the cases listed herein did not involve claims for risk of subsequently developing cancer, but rather were claims for asbestos pleural disease and parenchymal asbestosis, including fear of cancer, it is Ordered that the jury verdict and subsequent entry of judgment pursuant to said verdict does not extinguish any rights should the plaintiff subsequently develop an asbestos-related malignancy. The Court has specifically ruled that claims for asbestos-related malignancies constitute separate causes of actions from claims for asbestos pleural disease and parenchymal asbestos and fear of cancer.

Costs are taxed against non-prevailing Defendants.

The Defendants object and except to all adverse rulings of the Court.

ENTERED under my hand this 15th day of May, 1991.

/s/ Robert B. Stone
JUDGE STONE

SUBMITTED BY:

SCOTT S. SEGAL
HOSTLER AND SEGAL
810 Kanawha Boulevard, East
Charleston, WV 25301
(304) 344-9100

IN THE CIRCUIT COURT
OF MONONGALIA COUNTY, WEST VIRGINIA

Civil Action No.: 86-C-800

DELIAH F. CROSS, Administratrix of the Estate of Frederick Cross,

Plaintiff,

v.

ARMSTRONG WORLD INDUSTRIES, INC., *et al.*,

Defendants.

JUDGMENT ORDER

BE IT REMEMBERED that on the 25th day of April, 1991, came the parties, by counsel, and did argue their motions for judgments notwithstanding the verdicts and for new trial based upon the verdicts entered against them by a petit jury of this Court on the 22nd day of March, 1991.

The Court having maturely considered the same, does hereby HOLD and ORDER that all motions for judgments notwithstanding the verdict and for new trials are hereby denied.

The Court does hereby further HOLD and ORDER that Plaintiff Deliah F. Cross' compensatory damages were determined by the Jury to be Ninety-One Thousand Nine Hundred Forty-Two Dollars ($91,942.00). The Court does hereby further find that the Plaintiff Deliah F. Cross had negotiated settlements in her case totalling Fifty-Eight Thousand Six Hundred Dollars ($58,600.00) prior to said verdict. The Court does in addition find that Six Thousand Dollars ($6,000.00) of these negotiated settlements is based upon a contingent and deferred

payment and should therefore not be set off from the judgment at this time. The Court does hereby HOLD and ORDER that the appropriate amount of set-offs from the Ninety-One Thousand Nine Hundred Forty-Two Dollars ($91,942.00) compensatory verdict shall be Fifty-Two Thousand Six Hundred Dollars ($52,600.00).

In addition to the above stated damages, the Court hereby finds the Plaintiff was awarded the sum of Five Thousand Five Hundred Forty-Two Dollars ($5,542.00) for funeral, hospital and medical expenses and it is ORDERED Plaintiff receive pre-judgment interest at the legal rate on said amount from the date the damages were incurred until paid.

The only defendants against whom Plaintiff was awarded a verdict both jointly and severally was the Defendants Owens-Illinois, Inc. and Keene Corporation. The Defendants Owens-Illinois and Keene Corporation is therefore ORDERED to pay unto the Plaintiff both jointly and severally the sum of Thirty-Nine Thousand Three Hundred Forty-Two Dollars ($39,342.00) plus interest thereon from the date of the jury verdict on March 22, 1991, until paid.

Owens-Illinois, Inc., is hereby ORDERED to forthwith obtain a bond in the sum of Thirty-Nine Thousand Three Hundred Forty-Two Dollars ($39,342.00) prior to perfecting any appeal in this matter, plus an additional amount of $4,000.00 dollars.

Keene Corporation is hereby ORDERED to forthwith obtain a bond in the sum of Thirty-Nine Thousand Three Hundred Forty-Two Dollars ($39,342.00) prior to perfecting any appeal in this matter, plus an additional amount of $4,000.00 Dollars.

Costs are taxed against non-prevailing Defendants.

The Defendants object and except to all adverse rulings of the Court.

ENTERED under my hand this 25th day of April, 1991.

/s/ Larry V. Starcher
JUDGE STARCHER

SUBMITTED BY:

/s/ Scott S. Segal
SCOTT S. SEGAL
HOSTLER AND SEGAL
810 Kanawha Boulevard, East
Charleston, WV 25301
(304) 344-9100

IN THE CIRCUIT COURT
OF MONONGALIA COUNTY, WEST VIRGINIA

Civil Action No.: 86-C-830

LAWRENCE W. CROOK, SR. and
ELEANOR J. CROOK, his wife,
Plaintiffs,

v.

ARMSTRONG WORLD INDUSTRIES, INC., *et al.*,
Defendants.

JUDGMENT ORDER

BE IT REMEMBERED that on the 25th day of April, 1991, came the parties, by counsel, and did argue their motions for judgments notwithstanding the verdicts and for new trial based upon the verdicts entered against them by a petit jury of this Court on the 22nd day of March, 1991.

The Court having maturely considered the same, does hereby HOLD and ORDER that all motions for judgments notwithstanding the verdict and for new trials are hereby denied.

The Court does hereby further HOLD and ORDER that Plaintiff Lawrence W. Crook's compensatory damages were determined by the Jury to be One Hundred Ninety Thousand Dollars ($190,000.00). The Court does hereby further find that the Plaintiff Lawrence W. Crook had negotiated settlements in his case totalling One Hundred Sixty-Nine Thousand Nine Hundred Twenty-Five Dollars ($169,925.00) prior to said verdict. The Court does in addition find that Twelve Thousand Dollars ($12,000.00) of these negotiated settlements is based

upon a contingent and deferred payment and should therefore not be set off from the judgment at this time. The Court does hereby HOLD and ORDER that the appropriate amount of set-offs from the One Hundred Ninety Thousand Dollars ($190,000.00) compensatory verdict shall be One Hundred Fifty-Seven Thousand Nine Hundred Twenty-Five ($157,925.00).

The only defendant against whom Plaintiff was awarded a verdict was the Defendant Owens-Illinois, Inc. The Defendant Owens-Illinois is therefore ORDERED to pay unto the Plaintiff the sum of Thirty-Two Thousand Seventy-Five Dollars ($32,075.00) plus interest thereon from the date of the jury verdict on March 22, 1991, until paid.

Owens-Illinois, Inc., is hereby ORDERED to forthwith obtain a bond in the sum of Thirty-Two Thousand Seventy-Five Dollars ($32,075.00) prior to perfecting any appeal in this matter, plus an additional amount of $3,200.00 dollars.

This Court previously having ruled that the cases listed herein did not involve claims for risk of subsequently developing lung cancer or mesothelioma, but rather were claims for asbestos pleural disease, parenchymal asbestosis, and colon cancer, including fear of cancer, it is Ordered that the jury verdict and subsequent entry of judgment pursuant to said verdict does not extinguish any rights should the plaintiff subsequently develop an asbestos-related lung malignancy, including lung cancer or mesothelioma. The Court has specifically ruled that claims for asbestos-related lung malignancies constitute causes of actions separate from claims for asbestos pleural disease, parenchymal asbestosis, laryngeal or colon cancer and fear of cancer.

Costs are taxed against non-prevailing Defendants.

The Defendants object and except to all adverse rulings of the Court.

ENTERED under my hand this 25th day of April, 1991.

/s/ Larry V. Starcher
JUDGE STARCHER

SUBMITTED BY:

/s/ Scott S. Segal
SCOTT S. SEGAL
HOSTLER AND SEGAL
810 Kanawha Boulevard, East
Charleston, WV 25301
(304) 344-9100

IN THE CIRCUIT COURT
OF MONONGALIA COUNTY, WEST VIRGINIA

Civil Action No.: 86-C-830

HELEN SMIGILL, Executrix of the Estate
of Rudy Smigill,

Plaintiff,

v.

ARMSTRONG WORLD INDUSTRIES, *et al.*,
Defendants.

JUDGMENT ORDER

BE IT REMEMBERED that on the 25th day of April, 1991, came the parties, by counsel, and did argue their motions for judgments notwithstanding the verdicts and for new trial based upon the verdicts entered against them by a petit jury of this Court on the 22nd day of March, 1991.

The Court having maturely considered the same, does hereby HOLD and ORDER that all motions for judgments notwithstanding the verdict and for new trials are hereby denied.

The Court does hereby further HOLD and ORDER that Plaintiff Helen Smigill's compensatory damages were determined by the Jury to be One Hundred Twenty-Four Thousand Nine Hundred Four Dollars ($124,904.00). The Court does hereby further find that the Plaintiff Helen Smigill had negotiated settlements in her case totalling Seventy-Five Thousand One Hundred Fifty Dollars ($75,150.00) prior to said verdict. The Court does in addition find that Four Thousand Five Hundred Dollars ($4,500.00) of these negotiated settlements is

based upon a contingent and deferred payment and should therefore not be set off from the judgment at this time. The Court does hereby HOLD and ORDER that the appropriate amount of set-offs from the One Hundred Twenty-Four Thousand Nine Hundred Four Dollars ($124,904.00) compensatory verdict shall be Seventy Thousand Six Hundred Fifty Dollars ($70,650.00).

In addition to the above stated damages, the Court hereby finds the Plaintiff was awarded the sum of Nineteen Thousand Three Hundred Four Dollars ($19,304.00) for funeral, hospital and medical expenses and it is ORDERED Plaintiff receive pre-judgment interest at the legal rate on said amount from the date the damages were incurred until paid.

The only Defendant against whom Plaintiff was awarded a verdict was the Defendant Owens-Illinois, Inc. The Defendant Owens-Illinois is therefore ORDERED to pay unto the Plaintiff the sum of Fifty-Four Thousand Two Hundred Fifty-Four Dollars ($54,254.00) plus interest thereon from the date of the jury verdict on March 22, 1991, until paid.

Owens-Illinois, Inc., is hereby ORDERED to forthwith obtain a bond in the sum of Fifty-Four Thousand Two Hundred Fifty-Four Dollars ($54,254.00) prior to perfecting any appeal in this matter, plus an additional amount of $5,400.00 dollars.

Costs are taxed against non-prevailing Defendants.

The Defendants object and except to all adverse rulings of the Court.

ENTERED under my hand this 25th day of April, 1991.

/s/ Larry V. Starcher
JUDGE STARCHER

SUBMITTED BY:

/s/ Scott S. Segal
SCOTT S. SEGAL
HOSTLER AND SEGAL
810 Kanawha Boulevard, East
Charleston, WV 25301
(304) 344-9100

IN THE CIRCUIT COURT
OF MONONGALIA COUNTY, WEST VIRGINIA

Civil Action No.: 86-C-831

CLARENCE DARRAH, *et al.*,
Plaintiff,

v.

ARMSTRONG WORLD INDUSTRIES, INC., *et al.*,
Defendants.

JUDGMENT ORDER

BE IT REMEMBERED that on the 15th day of May, 1991, came the parties, by counsel, and did argue their motions for judgments notwithstanding the verdicts and for new trial based upon the verdicts entered against them by a petit jury of this Court on the 18th day of March, 1991.

The Court having maturely considered the same, does hereby HOLD and ORDER that all motions for judgments notwithstanding the verdict and for new trials are hereby denied.

The Court does hereby further HOLD and ORDER that Plaintiff Clarence Darrah's's compensatory damages were determined by the Jury to be Thirty Thousand Dollars ($30,000.00). The Court does hereby further find that the Plaintiff Clarence Darrah had negotiated settlements in his case totalling Twenty-Two Thousand Two Hundred Fifty Dollars ($22,250.00) prior to said verdict. The Court does in addition find that Two Thousand Four Hundred Dollars ($2,400.00) of these negotiated settlements is based upon a contingent and deferred payment and should therefore not be set off from the judgment at

this time. The Court does hereby HOLD and ORDER that appropriate amount of set-offs from the Thirty Thousand Dollars ($30,000.00) compensatory verdict shall be Nineteen Thousand Eight Hundred Fifty Dollars ($19,850.00).

The only defendant against whom Plaintiff was awarded a verdict was the Defendant Owens-Illinois, Inc. The Defendant Owens-Illinois, Inc. is therefore ORDERED to pay unto the Plaintiff the sum of Ten Thousand One Hundred Fifty Dollars ($10,150.00) plus interest thereon from the date of the jury verdict on March 18, 1991, until paid.

In addition to the jury's verdict in the above-styled action, the Defendant Owens-Illinois, Inc. is ordered to pay the Plaintiff the sum of Five Thousand Dollars ($5,000.00) as punitive and exemplary damages. Such punitive and exemplary damage awards shall in addition thereto include interest as of the date of the jury verdict at the legal rate of interest until such time as said judgments are paid.

Owens-Illinois, Inc. is hereby ORDERED to forthwith obtain a bond in the sum of Fifteen Thousand One Hundred Fifty Dollars ($15,150.00) prior to perfecting any appeal in this matter, plus an additional amount of $1,515.00 dollars.

This Court previously having ruled that the cases listed herein did not involve claims for risk of subsequently developing cancer, but rather were claims for asbestos pleural disease and parenchymal asbestosis, including fear of cancer, it is Ordered that the jury verdict and subsequent entry of judgment pursuant to said verdict does not extinguish any rights should the plaintiff subsequently develop an asbestos-related malignancy. The Court has specifically ruled that claims for asbestos-related malignancies constitute separate causes of actions from claims for asbestos pleural disease and parenchymal asbestosis and fear of cancer.

Costs are taxed against non-prevailing Defendants.

The Defendants object and except to all adverse rulings of the Court.

ENTERED under my hand this 15th day of May, 1991.

/s/ Robert B. Stone
JUDGE STONE

SUBMITTED BY:

/s/ Scott S. Segal
SCOTT S. SEGAL
HOSTLER AND SEGAL
810 Kanawha Boulevard, East
Charleston, WV 25301
(304) 344-9100

IN THE CIRCUIT COURT
OF MONONGALIA COUNTY, WEST VIRGINIA

Civil Action No.: 86-C-831

EDWARD C. EIKLEBERRY, *et al.*,
Plaintiff,

v.

ARMSTRONG WORLD INDUSTRIES, INC., *et al.*,
Defendants.

JUDGMENT ORDER

BE IT REMEMBERED that on the 15th day of May, 1991, came the parties, by counsel, and did argue their motions for judgments notwithstanding the verdicts and for new trial based upon the verdicts entered against them by a petit jury of this Court on the 18th day of March, 1991.

The Court having maturely considered the same, does hereby HOLD and ORDER that all motions for judgments notwithstanding the verdict and for new trials are hereby denied.

The Court does hereby find that the compensatory damages awarded to the plaintiff of Forty Thousand Dollars ($40,000.00) have been fully satisfied as a result of pretrial settlements.

The Court does hereby HOLD and ORDER that the Defendant Owens-Illinois, Inc. shall pay no monies to the plaintiff as compensatory damages. However, pursuant to the jury's verdict in the above-styled action, the Defendant Owens-Illinois, Inc. is ordered to pay the plaintiff the sum of Five Thousand Dollars ($5,000.00) as punitive and exemplary damages. Such punitive and exem-

plary damage awards shall in addition thereto include interest as of the date of the jury verdict at the legal rate of interest until such time as said judgments are paid.

Owens-Illinois, Inc. is hereby ORDERED to forthwith obtain a bond in the sum of Five Thousand Dollars ($5,000.00) prior to perfecting any appeal in this matter, plus an additional amount of $500.00 dollars.

This Court previously having ruled that the cases listed herein did not involve claims for risk of subsequently developing cancer, but rather were claims for asbestos pleural disease and parenchymal asbestosis, including fear of cancer, it is Ordered that the jury verdict and subsequent entry of judgment pursuant to said verdict does not extinguish any rights should the plaintiff subsequently develop an asbestos-related malignancy. The Court has specifically ruled that claims for asbestos-related malignancies constitute separate causes of actions from claims for asbestos pleural disease and parenchymal asbestosis and fear of cancer.

Costs are taxed against non-prevailing Defendants.

The Defendants object and except to all adverse rulings of the Court.

ENTERED under my hand this 15th day of May, 1991.

/s/ Robert B. Stone
JUDGE STONE

SUBMITTED BY:

/s/ Scott S. Segal
SCOTT S. SEGAL
HOSTLER AND SEGAL
810 Kanawha Boulevard, East
Charleston, WV 25301
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IN THE CIRCUIT COURT
OF MONONGALIA COUNTY, WEST VIRGINIA

Civil Action No.: 86-C-832

MRS. JEANETTE HOPPERS, Executrix
of the Estate of Alvin Hoppers,
Plaintiff,

v.

ARMSTRONG WORLD INDUSTRIES, INC., *et al.*,
Defendants.

JUDGMENT ORDER

BE IT REMEMBERED that on the 25th day of April, 1991, came the parties, by counsel, and did argue their motions for judgments notwithstanding the verdicts and for new trial based upon the verdicts entered against them by a petit jury of this Court on the 22nd day of March, 1991.

The Court having maturely considered the same, does hereby HOLD and ORDER that all motions for judgments notwithstanding the verdict and for new trials are hereby denied.

The Court does hereby further HOLD and ORDER that Plaintiff Jeanette Hoppers' compensatory damages were determined by the Jury to be One Hundred Fifteen Thousand Dollars ($115,000.00). The Court does hereby further find that the Plaintiff Jeanette Hoppers had negotiated settlements in her case totalling Seventy-Two Thousand Six Hundred Dollars ($72,600.00) prior to said verdict. The Court does in addition find that Nine Thousand Dollars ($9,000.00) of these negotiated settlements is based upon a contingent and deferred payment and

should therefore not be set off from the judgment at this time. The Court does hereby HOLD and ORDER that the appropriate amount of set-offs from the One Hundred Fifteen Thousand Dollars ($115,000.00) compensatory verdict shall be Sixty-Three Thousand Six Hundred Dollars ($63,600.00).

In addition to the above stated damages, the Court hereby finds the Plaintiff was awarded the sum of Nineteen Thousand Dollars ($19,000.00) for funeral, hospital and medical expenses and it is ORDERED Plaintiff receive pre-judgment interest at the legal rate on said amount from the date the damages were incurred until paid.

The only defendant against whom Plaintiff was awarded a verdict was the Defendant Owens-Illinois, Inc. The Defendant Owens-Illinois is therefore ORDERED to pay unto the Plaintiff the sum of Fifty-One Thousand Four Hundred Dollars ($51,400.00) plus interest thereon from the date of the jury verdict on March 22, 1991, until paid.

Owens-Illinois, Inc., is hereby ORDERED to forthwith obtain a bond in the sum of Fifty-One Thousand Four Hundred Dollars ($51,400.00) prior to perfecting any appeal in this matter, plus an additional amount of $5,000.00 dollars.

Costs are taxed against non-prevailing Defendants.

The Defendants object and except to all adverse rulings of the Court.

ENTERED under my hand this 25th day of April, 1991.

/s/ Larry V. Starcher
JUDGE STARCHER

SUBMITTED BY:

/s/ Scott S. Segal
SCOTT S. SEGAL
HOSTLER AND SEGAL
810 Kanawha Boulevard, East
Charleston, WV 25301
(304) 344-9100

IN THE CIRCUIT COURT
OF MONONGALIA COUNTY, WEST VIRGINIA

Civil Action No.: 86-C-832

IVAN L. LEWIS, *et al.*,

Plaintiff,

v.

ARMSTRONG WORLD INDUSTRIES, INC., *et al.*,

Defendants.

JUDGMENT ORDER

BE IT REMEMBERED that on the 15th day of May, 1991, came the parties, by counsel, and did argue their motions for judgments notwithstanding the verdicts and for new trial based upon the verdicts entered against them by a petit jury of this Court on the 18th day of March, 1991.

The Court having maturely considered the same, does hereby HOLD and ORDER that all motions for judgments notwithstanding the verdict and for new trials are hereby denied.

The Court does hereby find that the compensatory damages awarded to the plaintiff of Fifteen Thousand Dollars ($15,000.00) have been fully satisfied as a result of pretrial settlements.

The Court does hereby HOLD and ORDER that the Defendant Owens-Illinois, Inc. shall pay no monies to the plaintiff as compensatory damages. However, pursuant to the jury's verdict in the above-styled action, the Defendant Owens-Illinois, Inc. is ordered to pay the plaintiff the sum of Five Thousand Dollars ($5,000.00) as

punitive and exemplary damages. Such punitive and exemplary damage awards shall in addition thereto include interest as of the date of the jury verdict at the legal rate of interest until such time as said judgments are paid.

Owens-Illinois, Inc. is hereby ORDERED to forthwith obtain a bond in the sum of Five Thousand Dollars ($5,000.00) prior to perfecting any appeal in this matter, plus an additional amount of $500.00 dollars.

This Court previously having ruled that the cases listed herein did not involve claims for risk of subsequently developing cancer, but rather were claims for asbestos pleural disease and parenchymal asbestosis, including fear of cancer, it is Ordered that the jury verdict and subsequent entry of judgment pursuant to said verdict does not extinguish any rights should the plaintiff subsequently develop an asbestos-related malignancy. The Court has specifically ruled that claims for asbestos-related malignancies constitute separate causes of actions from claims for asbestos pleural disease and parenchymal asbestosis and fear of cancer.

Costs are taxed against non-prevailing Defendants.

The Defendants object and except to all adverse rulings of the Court.

ENTERED under my hand this 15th day of May, 1991.

/s/ Robert B. Stone
JUDGE STONE

SUBMITTED BY:

SCOTT S. SEGAL
HOSTLER AND SEGAL
810 Kanawha Boulevard, East
Charleston, WV 25301
(304) 344-9100

IN THE CIRCUIT COURT
OF MONONGALIA COUNTY, WEST VIRGINIA

Civil Action No.: 86-C-833

LINCOLN BOLYARD and
JACKLYN BOLYARD, his wife, *et al.*,
Plaintiff,

v.

ARMSTRONG WORLD INDUSTRIES, INC., *et al.*,
Defendants.

JUDGMENT ORDER

BE IT REMEMBERED that on the 25th day of April, 1991, came the parties, by counsel, and did argue their motions for judgments nothwithstanding the verdicts and for new trial based upon the verdicts entered against them by a petit jury of this Court on the 22nd day of March, 1991.

The Court having maturely considered the same, does hereby HOLD and ORDER that all motions for judgements notwithstanding the verdict and for new trials are hereby denied.

The Court does hereby further HOLD and ORDER that Plaintiff Lincoln Bolyard's compensatory damages were determined by the Jury to be One Hundred Thousand Dollars ($100,000.00). The Court does hereby further find that the Plaintiff Lincoln Bolyard had negotiated settlements in his case totalling Eighty-Five Thousand Three Hundred Dollars ($85,300.00) prior to said verdict. The Court does in addition find that Five Thousand Seven Hundred Dollars ($5,700.00) of these negotiated settlements is based upon a contingent and deferred payment and should therefore not be set off from

the judgment at this time. The Court does hereby HOLD and ORDER that the appropriate amount of set-offs from the One Hundred Thousand Dollars ($100,000.00) compensatory verdict shall be Seventy-Nine Thousand Six Hundred Dollars ($79,600.00).

The only defendants against whom Plaintiff was awarded a verdict both jointly and severally was the Defendants Owens-Illinois, Inc. and Keene Corporation. The Defendants Owens-Illinois and Keene Corporation is therefore ORDERED to pay unto the Plaintiff both jointly and severally the sum of Twenty Thousand Four Hundred Dollars ($20,400.00) plus interest thereon from the date of the jury verdict on March 22, 1991, until paid.

Owens-Illinois, Inc., is hereby ORDERED to forthwith obtain a bond in the sum of Twenty Thousand Four Hundred Dollars ($20,400.00) prior to perfecting any appeal in this matter, plus an additional amount of $2,000.00 dollars.

Keene Corporation is hereby ORDERED to forthwith obtain a bond in the sum of Twenty Thousand Four Hundred Dollars ($20,400.00) prior to perfecting any appeal in this matter, plus an additional amount of $2,000.00 Dollars.

This Court previously having ruled that the cases listed herein did not involve claims for risk of subsequently developing lung cancer or mesothelioma, but rather were claims for asbestos pleural disease, parenchymal asbestosis, and colon cancer, including fear of cancer, it is Ordered that the jury verdict and subsequent entry of judgment pursuant to said verdict does not extinguish any rights should the plaintiff subsequently develop an asbestos-related lung malignancy, including lung cancer or mesthelioma. The Court has specifically ruled that claims for asbestos-related lung malignancies constitute causes of actions separate from claims for

asbestos pleural disease, parenchymal asbestosis, laryngeal or colon cancer and fear of cancer.

Costs are taxed against non-prevailing Defendants.

The Defendants object and except to all adverse rulings of the Court.

ENTERED under my hand this 25th day of April, 1991.

/s/ Larry V. Starcher
JUDGE STARCHER

SUBMITTED BY:

/s/ Scott S. Segal
SCOTT S. SEGAL
HOSTLER AND SEGAL
810 Kanawha Boulevard, East
Charleston, WV 25301
(304) 344-9100

IN THE CIRCUIT COURT
OF MONONGALIA COUNTY, WEST VIRGINIA

Civil Action No.: 87-C-11

LUCILLE SIMMONS, Executrix of the Estate
of Robert Simmons,

Plaintiff,

v.

ARMSTRONG WORLD INDUSTRIES, *et al.*,

Defendants.

JUDGMENT ORDER

BE IT REMEMBERED that on the 25th day of April, 1991, came the parties, by counsel, and did argue their motions for judgments notwithstanding the verdicts and for new trial based upon the verdicts entered against them by a petit jury of this Court on the 22nd day of March, 1991.

The Court having maturely considered the same, does hereby HOLD and ORDER that all motions for judgments notwithstanding the verdict and for new trials are hereby denied.

The Court does hereby further HOLD and ORDER that Plaintiff Lucille Simmons' compensatory damages were determined by the Jury to be One Hundred Eighty-One Thousand One Hundred Forty-Six Dollars ($181,146.00). The Court does hereby further find that the Plaintiff Lucille Simmon had negotiated settlements in her case totalling Forty-Four Thousand One Hundred Fifty Dollars ($44,150.00) prior to said verdict. The Court does in addition find that Ten Thousand Five Hundred Dollars ($10,500.00) of these negotiated settlements

is based upon a contingent and deferred payment and should therefore not be set off from the judgment at this time. The Court does hereby HOLD and ORDER that the appropriate amount of set-offs from the One Hundred Eighty-One Thousand One Hundred Forty-Six Dollars ($181,146.00) compensatory verdict shall be Thirty-Three Thousand Six Hundred Fifty Dollars ($33,650.00).

In addition to the above stated damages, the Court hereby finds the Plaintiff was awarded the sum of Eight Thousand Three Hundred Forty-Six Dollars ($8,346.00) for funeral, hospital and medical expenses and it is ORDERED Plaintiff receive pre-judgment interest at the legal rate on said amount from the date the damages were incurred until paid.

The only defendants against whom Plaintiff was awarded a verdict both jointly and severally was the Defendants Owens-Illinois, Inc. and Keene Corporation. The Defendants Owens-Illinois and Keene Corporation is therefore ORDERED to pay unto the Plaintiff both jointly and severally the sum of One Hundred Forty-Seven Thousand Four Hundred Ninety-Six Dollars ($147,496.00) plus interest thereon from the date of the jury verdict on March 22, 1991, until paid.

Owens-Illinois, Inc., is hereby ORDERED to forthwith obtain a bond in the sum of One Hundred Forty-Seven Thousand Four Hundred Ninety-Six Dollars ($147,496.00) prior to perfecting any appeal in this matter, plus an additional amount of $14,000.00 dollars.

Keene Corporation is hereby ORDERED to forthwith obtain a bond in the sum of One Hundred Forty-Seven Thousand Four Hundred Ninety-Six Dollars ($147,496.00) prior to perfecting any appeal in this matter, plus an additional amount of $14,000.00 Dollars.

Costs are taxed against non-prevailing Defendants.

The Defendants object and except to all adverse rulings of the Court.

ENTERED under my hand this 25th day of April, 1991.

/s/ Larry V. Starcher
JUDGE STARCHER

SUBMITTED BY:

/s/ Scott S. Segal
SCOTT S. SEGAL
HOSTLER AND SEGAL
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Charleston, WV 25301
(304) 344-9100

IN THE CIRCUIT COURT
OF MONONGALIA COUNTY, WEST VIRGINIA

Civil Action No.: 88-C-146

JEANETTE D. ROGERS, Executrix of the Estate of Earl Horne,

Plaintiff,

v.

ANCHOR PACKING COMPANY, *et al.*,

Defendants.

JUDGMENT ORDER

BE IT REMEMBERED that on the 25th day of April, 1991, came the parties, by counsel, and did argue their motions for judgments notwithstanding the verdicts and for new trial based upon the verdicts entered against them by a petit jury of this Court on the 22nd day of March, 1991.

The Court having maturely considered the same, does hereby HOLD and ORDER that all motions for judgments notwithstanding the verdict and for new trials are hereby denied.

The Court does hereby further HOLD and ORDER that Plaintiff Jeanette D. Rogers' compensatory damages were determined by the Jury to be Ninety-Four Thousand Nine Hundred Dollars ($94,900.00). The Court does hereby further find that the Plaintiff Jeanette D. Rogers had negotiated settlements in her case totalling Thirty-Five Thousand Two Hundred Twenty-Five Dollars ($35,225.00) prior to said verdict. The Court does in addition find that Three Thousand Nine Hundred Dollars ($3,900.00) of these negotiated settlements is based

upon a contingent and deferred payment and should therefore not be set off from the judgment at this time. The Court does hereby HOLD and ORDER that the appropriate amount of set-offs from the Ninety-Four Thousand Nine Hundred Dollars ($94,900.00) compensatory verdict shall be Thirty-One Thousand Three Hundred Twenty-Five Dollars ($31,325.00).

In addition to the above stated damages, the Court hereby finds the Plaintiff was awarded the sum of Eighteen Thousand One Hundred Dollars ($18,100.00) for funeral, hospital and medical expenses and it is ORDERED Plaintiff receive pre-judgment interest at the legal rate on said amount from the date the damages were incurred until paid.

The only defendants against whom Plaintiff was awarded a verdict both jointly and severally was the Defendants Owens-Illinois, Inc. and Keene Corporation. The Defendants Owens-Illinois, and Keene Corporation is therefore ORDERED to pay unto the Plaintiff both jointly and severally the sum of Sixty-Three Thousand Five Hundred Seventy-Five Dollars ($63,575.00) plus interest thereon from the date of the jury verdict on March 22, 1991, until paid.

Owens-Illinois, Inc., is hereby ORDERED to forthwith obtain a bond in the sum of Sixty-Three Thousand Five Hundred Seventy-Five Dollars ($63,575.00) prior to perfecting any appeal in this matter, plus an additional amount of $6,000.00 dollars.

Keene Corporation is hereby ORDERED to forthwith obtain a bond in the sum of Sixty-Three Thousand Five Hundred Seventy-Five Thousand [sic] Dollars ($63,575.00) prior to perfecting any appeal in this matter, plus an additional amount of $6,000.00 Dollars.

Costs are taxed against non-prevailing Defendants.

The Defendants object and except to all adverse rulings of the Court.

ENTERED under my hand this 25th day of April, 1991.

/s/ Larry V. Starcher
JUDGE STARCHER

SUBMITTED BY:

/s/ Scott S. Segal
SCOTT S. SEGAL
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Supreme Court, U.S.
FILED
SEP 14 1992
OFFICE OF THE CLERK

No. 92-360

In The

Supreme Court of the United States

October Term, 1992

OWENS-ILLINOIS, INC.,

Petitioner,

v.

LINCOLN BOLYARD, et al.,

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of Appeals Of West Virginia

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

TYBE A. BRETT*
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QUESTIONS PRESENTED FOR REVIEW

1. Whether a jury award of punitive damages, reviewed and upheld by the trial court and the state appellate court, comports with due process when the defendant had the opportunity to present all relevant evidence and raised no issues warranting closer post-verdict scrutiny.

2. Whether it is proper for a jury to impose multiple punitive damage awards against a defendant who for years after knowledge of the defect mass markets defective products injuring thousands of victims when such awards further the applicable substantive state law.

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RULES INVOLVED

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STATEMENT OF THE CASE

The Petition arises from asbestos personal injury actions brought by the Plaintiffs/Respondents in a West Virginia state court against a number of manufacturers of asbestos-containing products. In February 1991, the Plaintiffs/Respondents' cases were consolidated and tried in a group of thirty-nine (39) cases in two courtrooms before the Honorable Larry V. Starcher and the Honorable Robert B. Stone against Petitioner Owens-Illinois, Inc. and one other defendant, the only defendants who had not settled with the Plaintiffs. There is no dispute that West Virginia law applies.

The juries returned verdicts against Owens-Illinois in only some of the cases, and awarded compensatory damages to the Plaintiffs in those cases. In Judge Stone's courtroom, the verdicts on compensatory damages ranged from $15,000 to $40,000, while in Judge Starcher's courtroom, the jury awarded compensatories to many Plaintiffs exceeding $100,000. In addition, the jury in Judge Stone's courtroom awarded punitive damages against Owens-Illinois in the amount of $5,000 in each of six (6) cases.

Plaintiff offered substantial testimony in support of their punitive damages claim. In particular, Plaintiffs introduced correspondence between the Saranac Research

Laboratory and Owens-Illinois and reports from Saranac covering the time period 1943 through 1952. Owens-Illinois asked Saranac to assess Kaylo, their asbestos-containing product, and the director of Saranac replied that "you have all the ingredients for a first class hazard." (Trial Ex. 3, Letter Dated Mar. 12, 1943 from Leroy U. Gardner, M.D. to U.E. Bowes). In subsequent reports, Saranac wrote to Owens-Illinois that "Kaylo is capable of producing asbestosis and must be regarded as a potentially hazardous material." (Trial Ex. 6, Letter dated Nov. 16, 1943 from Leroy U. Gardner, M.D. to U.E. Bowes). Despite these findings, Owens-Illinois sold Kaylo containing asbestos without any warning.

Based on this evidence, the trial courts instructed the jury as follows:

> The Court instructs the jury that in addition to compensatory damages, which if awarded are against a defendant to compensate a plaintiff for his injury, the law permits the jury under certain circumstances to award an injured plaintiff punitive damages against such defendant in order to punish such defendant or to deter others.
>
> The Court instructs the jury that under West Virginia law a defendant may be held liable for punitive damages in actions of tort such as this if the evidence reveals that a defendant in an action where punitive damages are sought was guilty of gross fraud, malice, oppression, or wanton, willful or reckless misconduct or criminal indifference to civil obligations affecting the rights of others. Therefore, you are instructed that if you believe that either defendant corporation was guilty of gross fraud, malice, oppression, or wanton, willful or reckless misconduct or criminal indifference to

> its civil obligations then you may award punitive damages against said defendant.
>
> The Court instructs the jury that punitive damages are awarded to punish a defendant and to deter others from pursuing a like course of conduct. The amount of punitive damages awarded, when considered together with compensatory damages, should be in such amount as the jury believes is sufficient to deter others from engaging in a like course of conduct.
>
> The Court instructs the jury that the fact that instructions have been given to you on the subject of damages should not be perceived by you as an intimation on the part of the Court that the defendant is or is not liable for the injuries and damages alleged. Such liability is to be determined solely by your own findings and from the evidence and the law as incorporated in these instructions.

(Tr. Volume 22 (Mar. 18, 1991)).

Owens-Illinois' Statement of the Case does not suggest that there was insufficient evidence of punitive damages, or that the trial courts refused to permit it to introduce any evidence relevant to the issue of punitive damages, or that the courts below erred in permitting the Plaintiffs to introduce their evidence of punitive damages. Owens-Illinois also does not complain that the charge to the jury failed to properly instruct on the issue of punitive damages. In fact, Owens-Illinois does not complain of any procedural deficiences except that the issue of punitive damages should not have been submitted to the jury at all. The arguments set forth in its Petition for a Writ of Certiorari were set forth in Owens-

Illinois' post-trial motions, which the trial courts considered and denied.

After the trial courts entered judgments, Owens-Illinois filed a Petition for Appeal in the Supreme Court of Appeals of the State of West Virginia on or about October 14, 1991, with the record therein accompanying the petition. Plaintiffs filed a Response on November 13, 1992, and Owens-Illinois presented a written reply. (Appendix B to Petition for a Writ of Certiorari). Pursuant to Rule 5 of the West Virginia Rules of Appellate Procedure, Owens-Illinois, but not the Plaintiffs, had the benefit of oral argument. (Respondents' Appendix at 6). Upon consideration of the foregoing, the West Virginia court refused the Petition for Appeal on May 13, 1992. (Appendix B of Petition for a Writ of Certiorari).

Thereafter, Owens-Illinois filed its Petition for a Writ of Certiorari.[1]

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[1] In the Petition for a Writ of Certiorari at 9-10, Owens-Illinois decries the decision of the trial court to direct a verdict against the Defendant on the issue of whether its asbestos-containing products were defective. This issue is one of state law and this Court must not review it. Further, contrary to Owens-Illinois' statement, numerous courts have recognized that asbestos-containing products are defective as a matter of law. *Halphen v. Johns-Manville Sales Corp.*, 788 F.2d 274 (5th Cir. 1986); *Golden v. Manville*, No. 3: CV-88-1752, slip op. (M.D. Pa. June 22, 1990); *Beshada v. Johns-Manville Products Corp.*, 90 N.J. 191, 447 A.2d 539 (1982); *Elmore v. Owens-Illinois, Inc.*, 673 S.W.2d 434 (Mo. 1984); *Hatt v. Johns-Manville Sales Corp.*, 488 F. Supp. 836 (E.D. Tex. 1980).

SUMMARY OF ARGUMENT

The major argument in the Petition for a Writ of Certiorari arising from a group of asbestos cases tried in a West Virginia state court is that multiple punitive damage awards against a defendant violate due process. This argument has been repeatedly rejected by this Court in cases raising precisely the same circumstances as the instant Petition.

In *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S.Ct. 1032 (1991), this Court clearly stated that punitive damages are governed by state law, but recognized that the process by which those damages are assessed and reviewed must satisfy the demands of procedural due process. These demands are satisfied in these cases. The charge to the jury explained the purposes of punitive damages under West Virginia law and instructed the jury on all relevant factors for which evidence had been introduced. The post verdict review process provided Petitioner the opportunity to argue the propriety of the punitive damage awards and to present additional evidence. The Petition for Appeal to the West Virginia Supreme Court was far from perfunctory, and involved extensive briefing and the opportunity for oral argument on the issue.

There is no dispute that the evidence of punitive damages was sufficient. Even if Petitioner's arguments had merit, it was not denied the opportunity to make those arguments and to present relevant evidence to the jury and to the trial court. Petitioner cannot seek to rectify its own failures at trial in this Court.

Further, multiple punitive damage awards such as those assessed against Petitioner comport with the substantive law of West Virginia and raise no substantive due process concerns. The purpose of punitive damages under West Virginia law are to punish the defendant, to deter others from engaging in similar conduct, to promote settlements, to provide additional compensation to the plaintiff, to encourage litigation and to substitute for personal revenge. When a company profits from the mass-marketing of defective products which cause injury and death to thousand of victims, the West Virginia courts have recognized the propriety of multiple punitive damage awards. *See Davis v. Celotex*, 1992 WL 130567 (W. Va. June 12, 1992).

In short, punitive damage awards of $5,000 per plaintiff in cases where compensatory damages ranged from $15,000 to $40,000 raises neither substantive nor procedural due process problems, and this Court should deny the Petition for a Writ of Certiorari.

ARGUMENT

I. The Jury Award Of Punitive Damages Reviewed And Upheld By The Trial Court And State Appellate Court Comports With Due Process When The Defendant Had The Opportunity To Present All Relevant Evidence And Raise No Issues Warranting Closer Post-Verdict Scrutiny.

Despite Owens-Illinois' protestations to the contrary, punitive damages have long been a part of traditional state tort law. *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S.

Ct. 1032, 1041 (1991); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984). Although defendants have mounted repeated federal attacks on this aspect of state law, these attempts have been firmly rejected by this Court. *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988); *Browning-Ferris Industries of Vermont, Inc, v. Kelco Disposal, Inc.*, 492 U.S. 257, 259-60 (1989) (Excessive Fines Clause of the Eighth Amendment does not apply to punitive damages awarded in civil cases between private parties); *United States v. Halper*, 490 U.S. 435, 450-51 (1989) (Double Jeopardy Clause of Fifth Amendment is not triggered by civil litigation between private parties).

In *Haslip*, the Court, for the first time, applied the Fourteenth Amendment to the Constitution to State law governing awards of punitive damages. Refusing to "draw a mathematical bright line between the constitutionally unacceptable that would fit every case," the Court reviewed the process by which punitive damages were assessed by the jury in the case before it, the post-trial procedures for scrutinizing punitive awards and the review provided by the Alabama Supreme Court, and rejected Pacific Mutual's challenge under the Due Process Clause of the Fourteenth Amendment.

In reviewing the jury's assessment of punitive damages against Pacific Mutual, Justice Blackmun did not require that punitive damages serve a particular purpose. Rather, he recognized the purposes of punitive damages under Alabama law. Because the jury instructions in *Haslip* expressly described the nature and purpose of punitive damages under the relevant State law, identified the damages as punishment for civil wrongdoing and explained that their imposition was not compulsory, the

instructions reasonably accommodated Pacific Mutual's interest in rational decision making and the state's interest in meaningful individualized assessment. Since the jury exercised its discretion with reasonable constraints, due process was satisfied. *Haslip*, 111 S. Ct. at 1044.

The Court also concluded that the trial court's scrutiny of the award post-trial, considering factors such as the culpability of the defendant's conduct, the desirability of discouraging others from similar conduct, the impact upon the parties and the impact on innocent third parties, ensured meaningful and adequate review by the trial court. *Id.*

The Court regarded appellate review as providing an additional check on the jury's or trial court's discretion. Recounting the factors that the Alabama Supreme Court considers in determining whether the award was excessive or inadequate, the Court concluded that appellate review makes certain that punitive damages are reasonable in their amount and rational in light of their purpose. In particular, the Court regarded the appellate court's post-verdict review as ensuring that punitive damage awards are not grossly out of proportion to the severity of the offenses and have some understandable relationship to compensatory damages.

Thus, it was important to the Court's conclusion in *Haslip* that the award furthered the purposes of punitive damages as described in the decisional law of the state.

The West Virginia Supreme Court recently reevaluated the procedures in West Virginia for awarding punitive damages in *Fleming Landfill v. Garnes*, 186 W. Va. 656, 413 S.E.2d 897 (1991), on remand from *Fleming Landfill v.*

Garnes, 111 S. Ct. 2882 (1991). In *Garnes* the West Virginia Court, like this Court, recognized the longstanding history of punitive damage awards and noted that no one (except perhaps a few academic commentators) questions the value of punitive damages as a deterrent to discourage bad acts, as an economic incentive to exercise greater care, and as encouraging good faith efforts at settlement.

The West Virginia Supreme Court then proceeded to apply the due process standards in *Haslip*. In *Garnes*, the West Virginia Supreme Court advanced the three general criteria for awards of punitive damages expressed by this Court in *Haslip*:

> (1) a reasonable constraint on the jury's discretion; (2) a meaningful and adequate review of the award by the trial court using established procedures; and (3) a meaningful and adequate review by the appellate court.

Garnes, 413 S.E.2d at 907.

More specifically, the West Virginia Court stated that the jury ought to consider the factors set forth in *Haslip*, 111 S. Ct. at 1045, but recognized that all of the factors need not be given to the jury because the jury will not possess all of the information necessary to use the factors properly. *Garnes*, 413 S.E.2d at 909. Briefly, these factors are: (1) punitive damages should bear a reasonable relationship to the harm that occurred or is likely to occur; (2) the reprehensibility of the defendant's conduct; (3) the profitability of defendant's wrongful conduct; (4) punitive damages should bear a reasonable relationship to compensatory damages; and (5) the financial position of the defendant. *Id*. In *Garnes*, the Court reversed the award

of punitive damages because the jury awarded punitives without finding any compensatory damages, contrary to factors (1) and (4). *Id.* at 908.

Garnes also described the trial court's role post-verdict. The trial court's review of an award of punitive damages should consider all of the *Haslip* standards and, in addition, should consider the appropriateness of punitive damages to encourage fair and reasonable settlements. *Garnes,* 413 S.E.2d at 908.

The West Virginia Court also confirmed its role on appellate review:

> Upon petition, this Court will review all punitive damage awards. In our review of the petition, we will consider the same factors that we required the jury and trial judge to consider, and all petitions must address each and every factor set forth in Syllabus Points 3 and 4 of this case with particularity, summarizing the evidence presented to the jury on the subject or to the trial court at the post-judgment review stage. Assignments of error related to a factor not specifically addressed in the petition will be deemed waived as a matter of state law.

Syllabus Point 5, *Garnes,* 413 S.E.2d at 900, 910.

Approximately six months after its decision in *Garnes,* the West Virginia Supreme Court reviewed a punitive damage award against an asbestos defendant in another case before one of the trial judges who presided at the cases below. In *Davis v. Celotex Corp.,* 1992 WL 130567 (W. Va. June 12, 1992), the Court in a written opinion rejected precisely the same issues raised by Owens-Illinois.

In *Davis*, the Court amplified the reasons for awarding punitive damages expressed in *Garnes*: "(1) to punish the Defendant; (2) to deter others from pursuing a similar course; and (3) to provide additional compensation for the egregious conduct to which the Plaintiff has been subjected." *Davis*, 1992 WL 130567 at *2 (quoting *Harless v. First National Bank in Fairmont*, 169 W. Va. 673, 691, 289 S.E.2d 692, 702 (1982), and citing *Jarvis v. Modern Woodmen of America*, 185 W. Va. 305, 406 S.E.2d 736 (1991)). In addition, the possibility of recovering punitive damages can encourage a plaintiff to bring an action where he might be discouraged by the costs and inconvenience of the action and can also serve as a substitute for personal revenge. *Davis*, 1992 WL 130567 at *2. The Court concluded that when an asbestos manufacturer has actual or constructive knowledge of the severe health hazards caused by a product and continues to manufacture and distribute that product, the manufacturer may be found liable for punitive damages to those injured by the product. *Id.* at *4. The Court also held that a successor corporation may be found liable for punitive damages for liability incurred by the predecessor company in its manufacture of defective products. *Id.* at *7.

Of particular interest to the instant Petition is the *Davis* Court's discussion of the argument that multiple punitive damage awards are fundamentally unfair under the Due Process Clause. The Court refused to decide the question as a matter of law. Noting that the defendant failed to present its concerns to the jury by introducing evidence of the prior punitive damage awards and arguing that it had been sufficiently punished, the West Virginia Court concluded that when the record fails to set

out sufficient facts to answer the question of whether substantive due process has been violated by multiple punitive damage awards in asbestos cases, the Court will decline to address the issue.

The Court in *Davis* also addressed the due process arguments raised by Owens-Illinois in its Petition for a Writ of Certiorari. In addition to reiterating the standard of appellate review articulated in *Garnes*, the West Virginia Court in *Davis* concluded:

> In sum, we hold that in cases tried before *Garnes* in which punitive damages were awarded, we will not set aside such awards if there is a factual basis for the punitive damages, if the punitive damages bear a reasonable relationship to the compensatory damages, and if the parties' main assignment of error is that the trial court's instruction did not contain all of the factors enunciated in *Garnes*.

Davis, 1992 WL 130567 at *10.

Although *Garnes* and *Davis* were decided after the trial of these cases, Owens-Illinois has failed to demonstrate that the procedures and standards clarified in those cases were not followed.

The courts' instructions, set forth in the Statement of the Case, placed reasonable constraints on the jury's discretion and did precisely what this Court held would satisfy due process in *Haslip*. The trial courts instructed the juries that the purpose of punitive damages is to punish a defendant and deter others from pursuing a like course of conduct. Further, the instruction made clear that punitive damages were to punish the defendant for "gross fraud, malice, oppression, or wanton, willful or

reckless misconduct or criminal indifference to the civil obligations affecting the rights of others." The instructions also explained that the imposition of punitive damages is not compulsory.

Thus, there was no significant difference between the instructions given here and the one approved by the Supreme Court in *Haslip*. The instructions confined the jury's discretion to deterrence and retribution, the West Virginia policy concerns. The instructions did not specifically describe certain factors, such as the profitability to defendants of their wrongful conduct, defendants' financial position or the costs of litigation. However, Owens-Illinois did not offer evidence of these factors, and were not denied the opportunity to do so. In fact, evidence of these factors would likely have prejudiced Owens-Illinois, and under such circumstances, the trial court would have been obligated to keep such evidence from the jury.

It should also be noted that Owens-Illinois does not complain that it was deprived of the opportunity to present evidence of other punitive damage awards or of its financial condition to the jury. If the trial courts did not instruct the juries on these factors, it was because the jury did not possess information necessary to use the factors properly.

The review by the trial courts was also adequate and meaningful. Owens-Illinois submitted post-trial motions that forced the trial courts to consider the issues raised here. Owens-Illinois was free to argue the applicability of other relevant standards and to present evidence on them, but having failed to avail itself of the opportunity, cannot complain of its own failure to this Court.

The Petition for Appeal to the West Virginia Supreme Court provided the "additional check" on the discretion of the jury and trial court deemed important by this Court in *Haslip*. The parties presented substantial briefs to the appellate court, and Owens-Illinois, but not the Plaintiffs, had the opportunity to present oral argument. *Davis* makes clear that the West Virginia Supreme Court will allow an appeal that raises issues warranting closer scrutiny. However, Owens-Illinois' Petition for Appeal did not address each and every factor with particularity nor did it summarize its evidence on these factors, because there was none. A party who has failed to avail itself of the opportunity to present relevant evidence cannot seek to rectify its own failure in the appellate court. *See, e.g., Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277, 280-82 (2d Cir.), *cert. denied sub nom. Pittsburgh Corning Corp. v. Simpson*, 111 S. Ct. 27 (1990); *Dunn v. Owens-Corning Fiberglas*, 774 F.Supp. 929, 946 (D.V.I. 1991). Unlike *Garnes*, in which no compensatory damages were awarded, the punitives awarded against Owens-Illinois were a fraction of the compensatory damages. Thus, the West Virginia Supreme Court found no basis to review the case and properly refused Owens-Illinois' Petition for Appeal.

The mere fact that the trial court's instruction did not contain all of the *Garnes* language did not amount to a denial of due process or a basis for the appellate court to review the award. Given that Owens-Illinois' conduct was egregious enough to impose punitive damages and the ratio between the compensatory and punitive damages awards is not unreasonable, the Court declined to

set aside the award. The jury was capable of accommodating Owens-Illinois' interest in rational decision making and the state's interest in meaningful, individualized assessment in that the jury differentiated between the egregiousness of Owens-Illinois' conduct and the other defendants who went to verdict, and awarded punitive damages in different amounts. The "across-the-board" damages awarded against Owens-Illinois were reasonable because Owens-Illinois' misconduct was similar, although often repeated, with respect to all Plaintiffs who were injured by Owens-Illinois' products. The punitives of $5,000 per Plaintiff were less than any compensatory damage award and bear a reasonable relationship to the serious harm caused.

The fact that the jury in Judge Starcher's courtroom awarded no punitives against Owens-Illinois does not implicate any due process concerns. There is nothing precise in a jury determination of damages, and the unpredictability of litigation encourages good faith efforts at settlement, an important reason that the West Virginia courts maintain the viability of punitive damages. *See Garnes*, 413 S.E.2d at 904. In fact, to reverse the award of punitive damages would send the wrong message. Owens-Illinois refused to settle its cases, and the compensatory damages awarded against it were, in many cases, offset by Plaintiffs' settlements with other defendants. To reverse the punitive damage award against a wrongdoer who is not required to pay compensatory damages due to fortuitous settlements with others would discourage settlements in multiple defendant cases.

To require an appellate court to automatically review all cases awarding punitive damages, as Owens-Illinois

suggests, would discourage settlements and increase the costs of litigation, contrary to the purpose of such awards. Thus, the West Virginia Supreme Court's refusal to prolong the litigation process was in keeping with the important public policies recognized in its case law.

II. It Is Proper For A Jury To Impose Multiple Punitive Damage Awards Against A Defendant Who For Years After Knowledge Of the Defect Mass-Markets Defective Products That Injure Thousands Of Victims When Such Awards Further Applicable Substantive State Law.

Owens-Illinois' argument that due process prohibits multiple punitive damage awards repeatedly has been raised in asbestos cases appealed to this Court, which properly has denied review. *See, e.g., Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085 (5th Cir. 1991), *cert. denied sub nom. Celotex Corp. v. Glasscock*, 112 S. Ct. 1778 (1992); *King v. Armstrong World Industries, Inc.*, 906 F.2d 1022 (5th Cir. 1990), *cert. denied sub nom. Celotex Corp. v. King*, 111 S. Ct. 2236 (1991); *Simpson, supra; Johnson v. Celotex Corp.*, 899 F.2d 1281 (2d Cir.), *cert. denied sub nom. Celotex Corp. v. Johnson*, 111 S. Ct. 297 (1990); *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394 (5th Cir.), *cert. denied*, 478 U.S. 1022 (1986). It is noteworthy that this Court denied certiorari in *Glasscock* after its decision in *Haslip*.

This Court should similarly refuse to review the awards of punitive damages in this case. Punitive damages are governed by state law. When held against the backdrop of West Virginia law, it is clear that the punitive damages awarded against Owens-Illinois further the purposes of such awards under West Virginia law. Owens-

Illinois profited from the mass-marketing of its asbestos-containing products which tragically caused injury and death to thousands of individuals, including the Plaintiffs.

Multiple punitive damage awards serve to encourage manufacturers to take steps to make their products safer and deter manufacturers from factoring the cost of a single punitive damage award into the cost of its product and accepting the risk of marketing a product paying limited punitive damages. If only a single punitive damage award were permitted, such assessment would occur before the full extent of the threat of harm caused by a wrongdoer were known.

Punitives are particularly important in asbestos cases involving multiple defendants to encourage good faith efforts at settlement. Defendants' wrongful conduct continued for many years after knowledge of the defect and injured many victims. Some of the compensatory damages awards against Owens-Illinois were offset by settlements with other defendants in accordance with *Board of Education v. Zando, Martin & Milstead, Inc.*, 182 W. Va. 597, 390 S.E.2d 796 (1990). There are no offsets against punitives. If there were no punitive damage awards, defendants who refused to settle might never be required to pay for the harm caused by defective products.

In the criminal context, West Virginia has recognized that when a single act results in multiple deaths, Article III, Section 5 of the West Virginia Constitution permits multiple punishments, and criminal defendants may receive as many sentences as there were deaths. *State v. Fortner*, 182 W. Va. 345, 387 S.E.2d 812, 826 (1989); *State ex*

rel. Lehman v. Strickler, 174 W. Va. 809, 329 S.E.2d 882 (1985); *State v. Myers*, 171 W. Va. 277, 298 S.E.2d 813 (1982). Certainly in the civil context, when a manufacturer's product causes death and injury to many people, multiple punitive damage awards are proper.

The jury's award of multiple punitive damages awards against Owens-Illinois was proper under West Virginia law and advances the purposes of punitive damages under the law of that state. Indeed, in *Davis*, the West Virginia Court held that multiple punitive damages are proper under precisely the same circumstances as are presented here. The holding in *Davis* is in accord with other decisions, many of which this Court has declined to review. *See, e.g., Glasscock, supra; Simpson, supra; Johnson, supra; Racich v. Celotex Corp.*, 887 F.2d 393 (2d Cir. 1989). The reasons are simple: it would be unjust to deny a plaintiff's legitimate claim for punitive damages merely because many others were also injured by a defendant's product. Given the great potential for harm by widely distributed defective products, a potential that materialized in these cases, multiple punitive damage awards are justified. *Jackson*, 781 F.2d at 407. Accordingly, all federal courts that have considered the question have held that it is *improper* to conclude that the punitive damages awarded in one case involved the same misconduct as in other cases. *See, e.g., Simpson*, 901 F.2d at 281; *Leonen v. Johns-Manville Corp.*, 717 F. Supp. 272 (D.N.J. 1989).

A total punitive damage award of $30,000 divided among 6 Plaintiffs (many of whom were awarded large compensatory damage awards that Owens-Illinois did not pay due to the Plaintiffs' fortuitous settlements with

others) comports with West Virginia law and does not raise any substantive constitutional problems. This Court properly has refused to entertain objections to punitive damage awards based on vague appeals to constitutional principles, *see Bankers Life & Casualty Co. v. Crenshaw, supra*, and should do so in these cases. This Court must not interfere with the development of substantive state tort law, and must deny Owens-Illinois' Petition for a Writ of Certiorari.

CONCLUSION

The multiple punitive damages awarded against the product manufacturer in these cases further the purposes of punitive damages under applicable state law. Petitioner had every opportunity to introduce relevant evidence. The state trial and appellate courts provided adequate and meaningful review. Thus, the punitive

damages comport with the demands of due process, and this Court must deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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Dated: September 14, 1992

RULES OF APPELLATE PROCEDURE
WEST VIRGINIA SUPREME COURT OF APPEALS

Rule 3. Petition for Appeal. (a) *Time for Petition.* No petition shall be presented for an appeal from, or a writ of supersedeas to, any judgment, decree or order, which shall have been rendered more than four months before such petition is filed in the office of the clerk of the circuit court where the judgment, decree or order being appealed was entered, whether the State be a party thereto or not; provided, that the judge of the circuit court may for good cause shown, by order entered of record prior to the expiration of such period of four months, extend and re-extend such period, not to exceed a total extension of two months, if a request for the transcript was made by the party seeking an appeal or supersedeas within thirty days of the entry of such judgment, decree or order. In appeals from administrative agencies, the petition for appeal shall be filed within the applicable time provided by the statute.

(b) *Notice for Criminal Appeal.* No petition from a criminal case shall be presented unless a notice of intent to appeal shall have been filed with the clerk of the court in which the judgment or order was entered within thirty days from the entry of such judgment or order. The notice of intent to appeal shall concisely state the grounds for appeal.

(c) *Form of Petition.* The petition for appeal and note of argument under prior practice shall be integrated into one document called the petition. A petition for an appeal shall state the following in the order indicated:

1. The kind of proceeding and nature of the ruling in the lower tribunal.

2. A statement of facts of the case.

3. The assignments of error relied upon on appeal and the manner in which they were decided in the lower tribunal.

4. Points and authorities relied upon, a discussion of law, and the relief prayed for.

(d) *Joint or Consolidated Appeals.* If two or more persons are entitled to appeal from a judgment or order of a lower tribunal and their interests are such that joinder may properly be made, they may join in petitioning for an appeal, and they may thereafter proceed on appeal as a single appellant. Appeals may be consolidated by order of the Supreme Court upon its own motion, or upon motion of a party, or by stipulation of the parties to the several appeals.

(e) *Service of Petition.* The petition for appeal shall be served in accordance with Rule 15.

(f) *Response to Petition.* When the appeal is from a judgment, order or decree of a circuit court, the respondent may file seven copies of a response with the Clerk of the Supreme Court within thirty days after the filing of the petition for appeal in the office of the clerk of the circuit court. When the appeal is from another tribunal, the respondent may file seven copies of a response with the Clerk of the Supreme Court within thirty days after the filing of the petition for appeal with the Clerk of the Supreme Court. (As amended by order entered November 29, 1989, effective January 1, 1990, by order entered

June 26, 1990, effective July 1, 1990, and by order entered December 13, 1990, effective March 1, 1991.)

Rule 4. Presentation of Petition. (a) *Filing with Clerk.* When the appeal is from an order of the circuit court, eight copies of the petition for appeal shall be filed in the office of the clerk of the circuit court where the judgment, decree or order being appealed was entered. The circuit clerk shall note on each copy the date on which the petition for appeal was filed. There shall be attached to the original petition a memorandum of all parties who have appeared in the action from which the appeal is sought, together with the names and addresses of their counsel of record, if any.

(b) *Transmission to the Supreme Court.* The circuit clerk shall retain one copy of the petition and, within twenty days from deposit of money or bond for costs under subparagraph (d), shall transmit seven copies of the petition, along with the trial court record as designated in paragraph (c), to the Clerk of the Supreme Court by United States certified mail.

(c) *Record on Petition.* The appellant shall designate by itemization to the clerk of the circuit court such pleadings, orders and exhibits to enable the Supreme Court to decide the matters arising in the petition:

(i) In lieu of filing all or part of the transcript of testimony the petitioner may file under Rule 4A, in which event he may rely on the facts stated in his petition, or

(ii) If the petitioner desires he may cause to be prepared, pursuant to the provisions of Rule 80 of the West Virginia Rules of Civil Procedure, a transcript of such part of the proceedings not already on file as he deems necessary for inclusion in the record.

The circuit clerk, before transmitting the record to the Supreme Court, shall arrange the papers, as nearly as possible, in chronological order of filing, shall number the pages, shall make and certify copies of all orders entered in the case which are not in the files, and shall prepare a table of contents or index.

(d) *Bond for Costs.* Before such petition and record are transmitted, the petitioner shall deposit with the clerk of the circuit court sufficient money, or a bond conditioned to pay the same, in a penalty and with sureties to be fixed and approved by such clerk, to pay: (1) the expenses of preparing and indexing the record; (2) fees for filing the petition and certifying necessary copies of orders; (3) costs of transmission and return of the record; and (4) costs of the making of the transcript. The clerk shall endorse on the petition that such deposit has been made or such bond fixed. (As amended by order entered November 29, 1989, effective January 1, 1990.)

Rule 4A. Presentation of Petition Without Transcript of Testimony. (a) *Purpose.* In order to provide an inexpensive and expeditious method of appeal, a petitioner may file his petition without the transcript of testimony taken in the lower court.

(b) *Filing with Circuit Court.* Eight copies of the petition shall be filed in the office of the clerk of the circuit where the judgment or order being appealed was entered within sixty days from the date of entry of the judgment of order. Two additional copies of the petition shall be served upon each party to the action being appealed, as provided in Rule 15, and such parties shall have thirty days to file a reply petition with the clerk of the circuit court. The respondent shall not be entitled to an oral argument under rule 5.

(c) *Record on Petition.* The petitioner shall designate by itemization to the clerk of the circuit court so much of the pleadings, orders and exhibits in the case as will enable the Supreme Court to decide the matters arising in the petition. In lieu of filing all or part of the transcript of testimony, the petitioner shall set out in the petition a statement of all facts pertinent to the issues he raises. The petition shall include a certificate by the petitioner's attorney that the facts alleged are faithfully represented and that they are accurately presented to the best of his ability. The use of the abbreviated procedure, set forth in this Rule 4A, places the highest possible fiduciary duty upon a lawyer with regard to the court and intentional misrepresentation of any sort is grounds for disciplinary action.

(d) *Transmission to the Supreme Court.* The circuit clerk shall retain in his office one copy of the petition. He shall, at the end of thirty days from the date the petition was filed under paragraph (b), supra, or after respondent has filed a reply petition, whichever occurs first, transmit by certified mail to the Clerk of the Supreme Court seven

copies of the petition. The circuit clerk, before transmitting the record to the Supreme Court, shall arrange the papers, as nearly as possible, in chronological order of filing, shall number the pages, shall make and certify copies of all orders entered in the case which are not in the files, and shall prepare a table of contents or index.

(e) *Bond for Costs.* Before such petition and record are transmitted to the Supreme Court, the petitioner shall deposit with the clerk of the circuit court sufficient money, or a bond conditioned to pay the same, in a penalty and with sureties to be fixed and approved by such clerk, to pay: (1) the expenses of preparing and indexing the record; (2) fees for filing the petition and certifying necessary copies of orders; (3) costs of transmission and return of the record. The clerk shall endorse on the petition that such deposit has been made or such bond filed.

Rule 5. Hearing on Petition. (a) *Time for Hearing.* Within thirty days from the date of receipt of the petition and record by the Clerk of the Supreme Court, counsel may request oral presentation on the petition on any regularly scheduled motion day thereafter. Such request shall be made to the Clerk of the Supreme Court in writing or by telephone. Oral presentation will be heard in the order in which such requests were made. Oral presentation will not be heard, except upon motion for good cause shown, prior to expiration of the period allowed for filing a response as provided in Rule 3(f).

(b) *Oral Presentation.* Oral presentation shall be limited to ten minutes, unless additional time is granted by the Court.

(c) *Waiver of Oral Presentation.* At any time after the transmission of the petition and record to the Clerk of the Supreme Court in accordance with Rule 4A(d), counsel may inform the Clerk in writing that an oral presentation is not desired, in which case the petition will be considered by the Court in chambers. (As amended by order entered December 13, 1990, effective March 1, 1991.)

* * *

Rule 7. Rejection or Allowance of Appeal. (a) *Rejection.* If the petition for appeal is rejected by the Supreme Court on the ground that the judgment or order is plainly right, no other petition for appeal from that judgment or order shall be permitted. If the petition for appeal is rejected on any other ground, or if no ground be cited in the rejection, the petitioner may renew the petition as many times as he desires during the period prescribed by law for presentation of petitions.

(b) *Renewal of Petition.* A petitioner desiring to renew a petition may notify the Clerk of the Supreme Court of his intention in writing within thirty days after the entry of the order denying his application. In such case, the Clerk shall retain the petition and record in the Supreme Court, the petition may be reheard in accordance with Rule 5, and an amended petition or supplemental argument may be filed.

If the Clerk of the Supreme Court receives no timely notice of the petitioner's intention to renew, he shall return the record to the circuit clerk, who shall repay the petitioner any money deposited under Rule 4(d) or Rule 4A(e), in excess of fees and expenses.

(c) *Allowance.* If the petition for appeal is granted:

(1) The Clerk of the Supreme Court shall docket the same and immediately send a copy of the order granting the appeal to the petitioner's counsel, or, if there is no counsel of record, to the petitioner, and to the clerk of the circuit court, who shall retain the same in his records.

(2) The Clerk of the Supreme Court shall forthwith return the record to the clerk of the circuit court for preparation of the record of the case for appeal in accordance with Rules 8 and 9.

(3) The Clerk of the Supreme Court shall then issue summons against all parties appearing of record, other than the petitioner, that they may be heard, and shall also issue any supersedeas which may have been awarded. The Clerk of the Supreme Court shall serve the summons upon the parties by mailing the same to the counsel of record for each party, or if there is no counsel of record, to the party at his last known address. Service shall be complete upon mailing. The Clerk of the Supreme Court shall note upon the docket the names of the parties to whom the summonses were mailed, with the date of mailing.

(4) The Court may grant a supersedeas or modify the conditions thereof, in accordance with rule 6.

Supreme Court, U.S.
FILED
SEP 22 1992
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No. 92-360

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

OWENS-ILLINOIS, INC.,
Petitioner,
v.
LINCOLN BOLYARD, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Appeals of West Virginia

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PETITIONER'S REPLY BRIEF

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QUESTIONS PRESENTED

1. Can the punitive damages awarded by one jury be sustained under the due process principles announced in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032 (1991), when a second jury, which heard the same evidence from the same witnesses in the same courtroom at the same time, found no punitive damages?

2. Does due process permit a state court jury to impose punitive damages without *any* appellate review?

3. Does due process permit repetitive awards of punitive damages for the same course of conduct in the absence of any mechanism for ensuring that the *total* punitive damages do not exceed the amount necessary for deterrence and punishment?

PARTIES AND RULE 29.1 STATEMENT

The parties and statement required by Rule 29.1 were included in Petitioner's petition for certiorari.

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STATUTES

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PETITIONER'S REPLY BRIEF

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1. The award of punitive damages against Owens-Illinois, Inc. ("Owens-Illinois") in this case was not subject to *any* substantive review by the trial or appellate courts. The trial court summarily and without explanation denied Owen-Illinois' motion for judgment notwithstanding the verdict. *See, e.g.*, Supplemental Appendix at SA-7, SA-10, SA-12 (Judgment Orders providing that "all motions for judgments notwithstanding the verdict and for new trials are hereby denied"). The West Virginia Supreme Court of Appeals declined to review Owens-Illinois' petition for appeal despite its announcement in *Fleming Landfill, Inc. v. Garnes*, 413 S.E.2d 897, 900 (W. Va. 1991), that the court would "review all punitive damages awards." The court later emphasized the importance of its decision in *Garnes* to previously-decided punitive damages cases. In a case decided in May, 1992, the West Virginia

court recognized that remand of every case not meeting the technical requirements of *Garnes* "would unnecessarily send far too many cases back for retrial," but went on to state: "We will, however, be especially diligent in our review of any punitive damages awards entered before *Garnes* was decided." *TXO Prod. Corp. v. Alliance Resources Corp.*, No. 20231, slip op. (W. Va. May 14, 1992), *petition for cert. filed*, No. ——— (Sept. 17, 1992).

The first ground asserted by Respondents Lincoln Bolyard, et al. ("Respondents") is that Owens-Illinois "failed to avail itself of the opportunity" to argue to the trial and appellate courts the standards applied on review of an award of punitive damages as announced by the West Virginia Supreme Court of Appeals in *Garnes*. Brief in opposition at 13-14. Bolyard criticizes Owens-Illinois' alleged failure to address "each and every factor [set forth in *Garnes*] with particularity." *Id.* at 14.

Respondents' argument completely disregards the fact that the decision in *Garnes* was announced more than nine months *after* review of the *Bolyard* punitive damages award by the trial court, and two months *after* Owens-Illinois briefed its due process arguments for the West Virginia Supreme Court of Appeals. For Respondents to attack a failure to discuss the *Garnes* factors in proceedings that pre-date that decision is disingenuous.

Respondents' argument also disregards the fact that Owens-Illinois argued extensively in its petition for appeal to the West Virginia Supreme Court of Appeals that the protections against excessive awards approved by this Court in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032 (1991), were not provided at trial, and that due process required that the punitive damages award be reviewed on appeal by application of detailed and substantive standards like those approved in *Haslip*.

The decision in *Davis v. Celotex Corp.*, No. 20651, slip op. (W. Va. June 12, 1992)—relied upon by Respondents

as the explanation for no appellate review here—also post-dates the *Bolyard* proceedings and is incorrectly interpreted by Respondents: in that case the West Virginia court merely stated that it would not set aside pre-*Garnes* awards of punitive damages in cases where the award is reasonably related to the compensatory damages, is supported by the factual evidence, "*and if the parties' main assignment of error* is that the trial court's instruction did not contain all of the factors enunciated in *Garnes*." *Id.* (emphasis added). Owens-Illinois' challenge to the punitive damages award is not based on the jury instructions (except to the extent those instructions directed the jury that Owens-Illinois' product was defective as a matter of law); rather, Owens-Illinois has argued that *Haslip* requires review of the award by application of "detailed substantive standards" in order to comport with due process. *See Haslip*, 111 S. Ct. at 1045 (observing that application of these standards have "real effect" in constraining the discretion of Alabama fact finders).

Due process requires that West Virginia afford its litigants protection against excessive awards of punitive damages, and *Haslip* provides that protection is supplied by careful post-verdict review of those awards. *See id.* at 1044 (post-verdict review "ensures that punitive damages awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages"). This Court should grant certiorari to further develop the principles in *Haslip* by holding that a punitive damages verdict that is subject to *no* limits on the jury's discretion violates due process.

2. The Fourth Circuit *en banc* recently emphasized the importance of the substantive standards applied on review of punitive damages awards in Alabama state courts and approved in *Haslip*. In *Johnson v. Hugo's Skateway*, Nos. 90-2499, 90-2509, slip op. (4th Cir. Sept. 8, 1992) (*en banc*), a diversity action tried in federal district court in Virginia, the Fourth Circuit vacated and re-

manded an award of punitive damages as inconsistent with the standards announced in *Haslip*. The court determined that while Virginia law might provide the substantive standards required on review of an award pursuant to *Haslip*, the federal court sitting in diversity is prohibited by the Seventh Amendment from applying those standards (which necessarily require taking new evidence) on review of a jury verdict. In doing so, the court stated that the "limited scope of review" afforded in federal court pursuant to Fed. R. Civ. P. 59 denied defendant due process. The court concluded that due process requires federal courts in diversity actions to compensate for this limited review by including in instructions to the jury substantive factors like those applied on review of an award of punitive damages by Alabama courts and approved in *Haslip*.

The Fourth Circuit's *en banc* decision in *Hugo's Skateway* emphasizes the significance of including substantive and meaningful standards in the punitive damage award process, either on review of the award or in instructions to the jury. Indeed, the court observed that substantive review by the state trial and appellate courts was "critical" to this Court's approval of Alabama law in *Haslip*. *Id.* The West Virginia Supreme Court of Appeals disregarded the guidance provided by *Haslip* (and the pronouncement in *Garnes* that the court would review all petitions of appeal from awards of punitive damages), and let the *Bolyard* awards stand without *any* appellate review. This result is inconsistent with *Haslip*, and illustrates the need for this Court to clarify the due process principles announced in that case.

3. Respondents also argue that the trial record does not reflect evidence relevant to the factors to be applied on review of a punitive damages award pursuant to *Garnes*. Brief in opposition at 14. In making this argument, Respondents lose sight of the function of post-verdict review of the award of punitive damages. In *Haslip*, this

Court approved Alabama law governing punitive damages, which provided in part that while evidence of defendant's net worth properly is kept from the jury, it may be considered by the reviewing courts in determining the excessiveness of the award. *Haslip*, 111 S. Ct. at 1044-45. The West Virginia court similarly recognized that "all of the information [relevant to the review factors] is not available to the jury," and that the trial court must consider that information (defendant's financial condition, good faith settlement negotiations) when reviewing the award. *Garnes*, 413 S.E.2d at 909. Indeed, the court properly noted that this evidence must be excluded at trial as unduly prejudicial. *Id.*

4. It is Respondents' position that the constitutionality of multiple awards of punitive damages need not be addressed by this Court because the West Virginia court has determined that repetitive awards are consistent with West Virginia law: Respondents repeatedly suggest that because the award of punitive damages in this case "further[s] the purpose of such awards under West Virginia law," this Court should deny the petition for a writ of certiorari. *See* Brief in opposition at 16; *see also* Brief in opposition at 6.

Respondents' argument fails in two important respects. First, whether due process is violated by multiple awards of punitive damages for a single course of conduct is a matter of federal constitutional law.

Second, the West Virginia court's decision in *Davis v. Celotex Corp.*, No. 20651, slip op. (W. Va. June 12, 1992) did not conclusively establish that multiple awards are appropriate pursuant to West Virginia law: the court specifically announced that a challenge to multiple awards of punitive damages might be appropriate and would be addressed by that court in cases presenting "sufficient facts to answer the question of whether substantive due process has been violated by multiple punitive damage awards." *Id.*

The *Bolyard* punitive damages awards are unconstitutional because Owens-Illinois already has paid punitive damages for the course of conduct alleged in these consolidated cases. *See, e.g., Johnson v. Celotex Corp.*, 899 F.2d 1281, 1288 (2d Cir.) ($1.8 million award of punitive damages in two cases against Owens-Illinois), *cert. denied*, 111 S. Ct. 297 (1990); *In re: New York City Asbestos Litig.*, 572 N.Y.S.2d 1006 (N.Y. App. Div. 1991) (consolidated cases resulting in award of punitive damages against Owens-Illinois). Repeated punishment violates the due process principles announced in *Haslip*. *See Haslip*, 111 S. Ct. at 1044-45 (due process prohibits punitive damage verdicts that exceed the amount necessary to serve the goals of retribution and deterrence). This case presents the appropriate vehicle for this Court to consider the due process concerns implicated by multiple awards of punitive damages for a single course of conduct.

Respectfully submitted.

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September 22, 1992